SANMARU OVERSEAS MARKETING SDN BHD & ANOR

v.

PT INDOFOOD INTERNA CORP & ORS

COURT OF APPEAL, PUTRAJAYA
ZALEHA ZAHARI JCA
ABDUL MALIK ISHAK JCA
ABU SAMAH NORDIN JCA
[CIVIL APPEAL NO: W-02-431-2006]
28 JANUARY 2009

TRADE MARKS: *Registered trade mark - Ownership of rights, dispute - Assignment of trade mark - Joinder of parties - Constructive trust - Consideration for transfer of trade mark - Delay and laches - Principles in awarding costs*

CIVIL PROCEDURE: *Parties - Joinder of parties - Whether barred by limitation - Locus standi - Liquidation of company - Rules of the High Court 1980, O. 15 r. 6, O. 20 r. 5 - Limitation Act 1953, s. 22(1)*

CONTRACT: *Assignment - Breach - Assignment of trade mark - Consideration for transfer - Determination of amount agreed upon as consideration*

TRUSTS: *Constructive trust - Claim for transfer of trade mark - Estoppel - Position in equity - Whether trade mark held on trust*

CIVIL PROCEDURE: *Summons for direction - Delay in making application - Inordinate and inexcusable delay - Conduct of parties*

CIVIL PROCEDURE: *Costs - Fees for more than one counsel - Principles applicable - Exercise of court's discretion - Whether ought to be interfered with*

This was an appeal by the defendants against the decision of the High Court pertaining to the plaintiffs' claim for the assignment of Trade Mark Nos. M/100816, S/32614 and SAR/27,663 ('Indomie Mark') in Class 30 in Malaysia from the 2nd defendant (a Malaysian company) to the 1st plaintiff (P.T. Indofood Interna Corp, an Indonesian company). The plaintiffs' claim was based on the following grounds: the 2nd defendant, pursuant to a Deed of

A Assignment dated 26 September 1990, had agreed to assign the Indomie Mark to the 1st plaintiff for a consideration of RM10; or alternatively, the 2nd and 3rd defendants held the Indomie Mark in Malaysia as constructive trustees for the 1st plaintiff and were required to transfer the Indomie Mark to the 1st plaintiff as and B when they were directed to do so by the plaintiffs. The 2nd and 3rd defendants claimed that the 2nd defendant was at all material times the legal and beneficial owner of the Indomie Mark, and to having acquired all of the goodwill, reputation and benefit of the Indomie Mark. They pleaded that the 2nd defendant had agreed C to sell the Indomie Mark to the 1st plaintiff and pursuant to a side letter dated 25 July 1990 ('side letter') the agreed consideration was USD680,000, and that the 1st plaintiff was in breach of the said contract by failing to pay that sum. The High Court judge's findings on the agreed issues for determination were D as follows: (i) the 3rd plaintiff was properly joined as a party in the proceedings; (ii) the agreed consideration for the assignment of the Indomie Mark was RM10 as contended by the plaintiffs; (iii) the 2nd defendant held the Indomie Mark in Malaysia in its name on a constructive trust for the 1st plaintiff; (iv) the plaintiffs E were not guilty of inordinate and inexcusable delay in not filing summons for directions and/or setting this action down for trial; and (v) on the issue of costs, this was a proper case to issue a certificate to two counsel. The 2nd and 3rd defendants, being dissatisfied, appealed to this court.

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Held (dismissing the appeal)
Per Zaleha Zahari & Abdul Malik Ishak JJCA delivering the judgment of the court:

G **(1)** The trial judge was of the view that the inclusion of Sukses Makmur as the 3rd plaintiff, rather than replace the 1st and 2nd plaintiffs, was appropriate since any decision made would apply to the plaintiffs jointly and severally. Completion of the merger was a matter between the plaintiffs in Indonesia and H that could not be of any concern to the defendants in Malaysia since, ultimately, the sharing of the fruits of litigation in this action was a matter *inter se* between the plaintiffs. The trial judge was correct in his views. On the allegation that the joinder of Sukses Makmur was barred by limitation, the powers of the court under O. 20 r. 5 read together with O. 15 r. 6 I of the Rules of the High Court 1980 include the power to

give leave to add a party or to amend any pleading even after the expiry of any relevant period of limitation or to add a new cause of action. Further, in the present case, the plaintiffs were claiming to recover trust property from the defendants; by virtue of s. 22(1) of the Limitation Act 1953, an action by a beneficiary came within the circumstances stated in paras. (a) or (b) of s. 22(1) *ie*, there was no period of limitation. In respect of the defendants' submission that the 1st and 2nd plaintiffs had been dissolved and liquidated as at March 1984 and had no *locus standi* before the High Court nor on appeal to this court, the 1st plaintiff's liquidator, by affidavit affirmed in the joinder application, averred that the process of liquidation had not been entirely completed. A similar statement was also made by the liquidator of the 2nd plaintiff. Similar to Malaysian company law, there is clearly a difference between a company that is in liquidation (and managed by a liquidator) and a company that is dissolved (not requiring any management). In the instant case, the 1st and 2nd plaintiffs were merely under liquidation and were, therefore, entitled to sue. (paras 25, 26, 27, 28 & 29)

(2) In all the letters that were exchanged between the parties and their solicitors from 25 July 1990 to 24 March 1993, there was no reference to any agreement to show that the consideration for the assignment of the Indomie Mark was USD680,000 as claimed by the defendants. On the contrary, the Deed of Assignment expressly stated that the consideration was a paltry RM10. The defendants could not point to a single contemporaneous document to support their claim that the agreed consideration was USD680,000. The 3rd defendant's version that an oral agreement was reached between himself and one Hendy Rusli at an unknown date in circumstances where, according to the 3rd defendant's own admission, Hendy Rusli was representing the Indofood group and was going to use monies belonging to that group (as opposed to Hendy Rusli's own monies) to pay for the USD680,000, did not represent the truth and it was, having regard to the salient facts of this case, neither credible nor believable. It was hardly surprising that based on the totality of the evidence, the High Court found as a fact that the consideration for the transfer was RM10. If the 3rd defendant's version had been believed by the High Court it

would mean that any finding of fact that the true consideration was USD680,000 would result in the High Court determining that the Deed of Assignment contained a false statement on a very material fact, namely, the consideration bearing in mind that the 3rd defendant had admitted to concealing the consideration of USD680,000 for the purpose of defrauding revenue. (paras 153 & 154)

(3) The Deed of Assignment was executed by both parties on 26 September 1990. It expressly stated the consideration of RM10 was paid by the assignees (1st plaintiff) to the assignors (2nd defendant), the receipt whereof the assignors hereby acknowledged. That being the case, the second defendant must be estopped from denying that the 1st plaintiff had paid to it the declared consideration of RM10. In such a situation and pending the registration of the assignment of the trademark, the position in equity may be described in the same way in which Jessel MR described the contract in *Lysaght v. Edwards*. Therefore, it followed that from 26 September 1990, the 2nd and/or 3rd defendants were holding the Indomie Mark in Malaysia as constructive trustees for the benefit of the 1st plaintiff. (paras 50, 51, 52, 155 & 165)

(4) The defendants had contributed to the delay in disposal of the action by raising procedural objections and issues. By reason of the numerous interlocutory applications (and appeals to the Court of Appeal) filed on behalf of both parties in this suit, it was not open for the defendants to level such accusations against the plaintiffs of being guilty of inordinate delay in setting this suit for trial. On the contrary, it was the defendants' intention, particularly in the few months leading up to the commencement of trial on 24 October 2004, to prevent the commencement of trial, including unsuccessfully making stay applications in the Court of Appeal. The plaintiffs were thus not guilty of conduct disentitling them to relief by reason of delay and/or laches. (para 53)

(5) The award of costs is discretionary and the judge in this instance considered it appropriate in the circumstances to award costs for two counsel. He had applied the right principles and there was no reason for this court to interfere with the exercise of that discretion. (para 54)

(6) The High Court judge was justified, given the ample documentary evidence, in giving judgment in favour of the plaintiffs after a long trial. There was neither any error of law on his part nor did he misappreciate the available evidence. On the contrary, the assessment of the available evidence was correctly and judiciously done, and there was no reason to disturb the decision of the High Court judge. (para 173)

Bahasa Malaysia *Translation Of Headnotes*

Ini ialah rayuan oleh defendan-defendan terhadap keputusan Mahkamah Tinggi berkenaan dengan tuntutan plaintif-plaintif untuk penyerahhakan Cap Dagang No. M/100816, S/32614 dan No. SAR/27,663 ('Cap Indomie') dalam Kelas 30 di Malaysia dari defendan kedua (sebuah syarikat Malaysia) ke plaintif pertama (P.T. Indofood Interna Corp, sebuah syarikat Indonesia). Tuntutan plaintif berdasarkan alasan-alasan berikut: defendan kedua, mengikut satu Suratikatan Penyerahhakan bertarikh 26 September 1990, telah bersetuju untuk serahhak Cap Indomie kepada plaintif pertama dengan balasan sebanyak RM10; atau secara alternatif, defendan kedua dan ketiga memegang Cap Indomie di Malaysia sebagai pemegang amanah konstruktif bagi plaintif pertama dan perlu memindah Cap Indomie kepada plaintif pertama apabila mereka diarahkan untuk berbuat sebegitu oleh plaintif-plaintif. Defendan-defendan kedua dan ketiga mendakwa bahawa defendan kedua pada semua masa material merupakan pemilik di sisi undang-undang dan secara benefisial Cap Indomie, dan telah memperolehi semua perasaan muhibah, reputasi dan faedah Cap Indomie itu. Mereka mengadu bahawa defendan kedua telah bersetuju untuk menjual Cap Indomie kepada plaintif pertama dan mengikut sesuatu surat sampingan bertarikh 25 Julai 1990 ('surat sampingan') balasan yang dipersetujui ialah sebanyak USD680,000 dan bahawa plaintif pertama telah memungkiri kontrak itu dengan kegagalannya untuk membayar jumlah itu. Dapatan hakim Mahkamah Tinggi atas isu-isu yang dipersetujui untuk ditentukan ialah seperti berikut: (i) plaintif ketiga telah dicantumkan dengan betul sebagai pihak dalam prosiding; (ii) balasan yang dipersetujui untuk penyerahhakan Cap Indomie ialah sebanyak RM10 seperti yang dikatakan oleh plaintif-plaintif; (iii) defendan kedua memegang Cap Indomie di Malaysia dalam namanya atas sesuatu amanah konstruktif bagi plaintif pertama; (iv) plaintif-plaintif tidak bersalah lewat tanpa alasan memfail saman

untuk arahan dan/atau menetapkan tindakan ini untuk perbicaraan; dan (v) atas isu kos, ini merupakan kes yang wajar untuk mengeluarkan sijil kepada dua kaunsel. Defendan kedua dan ketiga, oleh kerana tidak puas hati, membuat rayuan ke mahkamah ini.

Diputuskan (menolak rayuan)
Oleh Zaleha Zahari & Abdul Malik Ishak HHMR menyampaikan penghakiman mahkamah:

(1) Hakim perbicaraan berpendapat bahawa pemasukan Sukses Makmur sebagai plaintif ketiga, lebih dari menggantikan plaintif pertama dan kedua, ialah berpatutan kerana apa-apa keputusan yang dibuat akan melibatkan plaintif-plaintif bersesama dan berasingan. Keselesaian percantuman ialah suatu perkara di antara plaintif-plaintif di Indonesia dan ia tidak harus melibatkan defendan-defendan di Malaysia kerana, pada akhirnya, perkongsian hasil-hasil litigasi dalam tindakan ini merupakan perkara *inter se* di antara plaintif-plaintif. Hakim perbicaraan mempunyai pendapat yang betul. Berkenaan aduan bahawa percantuman Sukses Makmur dihalang oleh had masa, kuasa-kuasa mahkamah di bawah A. 20 k. 5 dibaca bersama dengan A. 15 k. 6 Kaedah-kaedah Mahkamah Tinggi 1980 termasuk kuasa untuk memberi kebenaran bagi menambahkan suatu pihak atau untuk meminda apa-apa pliding selepas tamatnya tempoh had masa relevan atau untuk menambahkan suatu kausa tindakan yang baru. Tambahan lagi, dalam kes ini, plaintif-plaintif menuntut untuk mendapatkan kembali hartanah amanah dari defendan-defendan; oleh sebab s. 22(1) Akta Had Masa 1953, sesuatu tindakan oleh seseorang benefisiari terangkum dalam halkeadaan yang dinyatakan dalam perenggan (a) atau (b) s. 22(1), iaitu, tidak ada tempoh had masa. Berhubungan dengan hujahan defendan-defendan bahawa plaintif pertama dan kedua telah dibubarkan dan diselesaikan sejak dari Mac 1984 dan tidak mempunyai *locus standi* di hadapan Mahkamah Tinggi ataupun dalam rayuan ke mahkamah ini, penyelesai plaintif pertama, melalui afidavit yang diesahkan dalam permohonan percantuman itu, telah berkata bahawa proses penyelesaian belum lagi sudah secara keseluruhan. Pernyataan yang serupa telah dibuat oleh penyelesai plaintif kedua. Serupa dengan undang-undang syarikat di Malaysia, terdapat perbezaan yang jelas di antara sesebuah syarikat dalam penyelesaian (dan yang diuruskan oleh

seseorang penyelesai) dan sesebuah syarikat yang telah dibubarkan (yang tidak memerlukan apa-apa pentadbiran). Dalam kes ini, plaintif pertama dan kedua hanya dibawah penyelesaian dan, oleh itu, berhak mendakwa. A

(2) Dalam semua surat-surat yang ditukar di antara pihak-pihak dan peguamcara mereka dari 25 Julai 1990 ke 24 Mac 1993, tidak ada perujukan kepada apa-apa perjanjian untuk menunjukkan balasan bagi penyerahhakan Cap Indomie ialah sebanyak USD680,000 seperti yang didakwa oleh defendan-defendan. Sebaliknya, Suratikatan Penyerahhakan menyatakan secara ekspres bahawa balasan itu hanya sebanyak RM10. Defendan-defendan tidak dapat menunjukkan sebarang dokumen semasa yang menyokong dakwaan mereka bahawa balasan yang dipersetujui ialah sebanyak USD680,000. Versi defendan ketiga bahawa sesuatu perjanjian lisan telah dibuat di antara beliau dan seorang yang bernama Hendy Rusli pada satu tarikh yang tidak diketahui dalam halkeadaan di mana, melalui pengakuan defendan ketiga sendiri, Hendy Rusli mewakili kumpulan Indofood dan berniat menggunakan duit kumpulan itu (bertentangan dengan duit Hendy Rusli sendiri) untuk membayar sebanyak USD680,000, tidak merupakan kebenaran dan ia, memandangkan fakta-fakta penting kes ini, tidak boleh dipercayai. Ia tidak memeranjatkan bahawa berdasarkan keseluruhan keterangan, Mahkamah Tinggi membuat dapatan fakta bahawa balasan untuk pemindahan itu ialah sebanyak RM10. Jika versi defendan ketiga telah dipercayai oleh Mahkamah Tinggi ia bermakna bahawa apa-apa dapatan fakta bahawa balasan betul ialah sebanyak USD680,000 akan mengakibatkan Mahkamah Tinggi menentukan bahawa Suratikatan Penyerahhakan mengandungi sesuatu pernyataan palsu berkenaan dengan suatu fakta yang sungguh material, iaitu, balasan itu memandangkan bahawa defendan ketiga telah mengaku menyembunyikan balasan sebanyak USD680,000 bagi tujuan memfraud hasil kerajaan. B C D E F G

(3) Suratikatan Penyerahhakan itu disempurnakan oleh kedua-dua pihak pada 26 September 1990. Ia menyatakan dengan nyata balasan sebanyak RM10 dibayar oleh pemegang serahhak (plaintif pertama) kepada penyerahhak (defendan kedua), di mana penerimaan itu dimaklumkan oleh penyerahhak. Oleh kerana itu, defendan kedua mesti diestop dari menafikan H I

bahawa plaintif pertama telah membayar kepadanya balasan sebanyak RM10 yang telah dinyatakan. Dalam situasi sebegitu dan sementara menunggu pendaftaran penyerahhakan cap dagang itu, kedudukan dalam ekuiti boleh digambarkan dalam cara yang sama seperti Jessel MR mengambarkan kontrak dalam *Lysaght v. Edwards*. Oleh itu, ia bererti bahawa dari 26 September 1990, defendan-defendan kedua dan/atau ketiga memegang Cap Indomie di Malaysia sebagai pemegang amanah konstruktif untuk kepentingan benefisial plaintif pertama.

(4) Defendan-defendan telah menyumbang kepada kelewatan menyelesaikan tindakan itu dengan membangkitkan bantahan dan isu prosedural. Disebabkan oleh permohonan interlokutori yang banyak (dan rayuan-rayuan ke Mahkamah Rayuan) yang difail atas pihak kedua-dua pihak dalam guaman ini, defendan-defendan tidak boleh menuduh plaintif-plaintif atas kesalahan kelewatan yang terlampau menetapkan guaman ini untuk perbicaraan. Sebaliknya, ia merupakan kehendak defendan, terutamanya dalam beberapa bulan menjelang permulaan perbicaraan pada 24 Oktober 2004, untuk menghalang permulaan perbicaraan itu, termasuk membuat permohonan untuk pergantunggan yang tidak berjaya ke Mahkamah Rayuan. Plaintif-plaintif, oleh itu, tidak bersalah melakukan apa-apa yang menghalang mereka dari mendapat relif disebabkan kelewatan dan/atau lache.

(5) Award untuk kos mengikut budi bicara dan hakim dalam kes ini memikirkan ia berpatutan dalam halkeadaan sedemikian untuk mengaward kos untuk dua kaunsel. Beliau telah menggunakan prinsip-prinsip yang betul dan mahkamah ini tidak mempunyai apa-apa sebab untuk campurtangan dengan penggunaan budi bicara itu.

(6) Hakim Mahkamah Tinggi berjustifikasi, memandangkan keterangan dokumentari yang banyak, memberi penghakiman yang berpihak kepada plaintif-plaintif selepas suatu perbicaraan yang berpanjangan. Tidak terdapat apa-apa kesilapan undang-undang oleh beliau atau kegagalan untuk mempertimbangkan keterangan yang ada. Sebaliknya, taksiran terhadap keterangan dibuat dengan betul dan cermat, dan tidak terdapat apa-apa sebab untuk campurtangan dengan keputusan hakim Mahkamah Tinggi.

Case(s) referred to:

Abdullah Zawawi Omar v. PP [1985] 2 CLJ 2; [1985] CLJ (Rep) 19 SC ***(refd)***

Allcard v. Skinner 57 The Law Times Vol. LVII, NS 61 ***(refd)***

Barclays Bank Ltd v Quistclose Investments Ltd [1970] AC 567 ***(refd)***

Binions and Another v. Evans [1972] 1 Ch 359 ***(refd)***

Boss Ramasamy v. Penang Port Sdn Bhd & Anor [1996] 1 LNS 26 ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

Boyce v. Paddington Borough Council [1903] 1 Ch 109 ***(refd)***

BSN Commercial Bank (M) Sdn Bhd v. Pentadbir Tanah Daerah, Mersing [1997] 3 CLJ Supp 1 HC ***(refd)***

Bukit Melita Sdn Bhd v. Lam Geok Hee & Ors [1996] 1 LNS 479 HC ***(refd)***

Byrne and Another v. Brown. Diplock, Third Party [1889] Vol XXII QBD 657 ***(refd)***

Canada and Dominion Sugar Company, Limited v. Canadian National (West Indies) Steamships, Limited [1947] AC 46 ***(refd)***

Carreras Rothmans Ltd v. Freeman Mathews Treasure Ltd (in liq) and Another [1985] 1 All ER 155 ***(refd)***

Chan Kern Miang v. Kea Resources Pte Ltd [1999] 1 SLR 145 ***(refd)***

Chan Min Swee v. Melawangi Sdn Bhd [2000] 7 CLJ 1 HC ***(refd)***

Chong Yoong Choy v. UOL Factoring Sdn Bhd [1996] 2 CLJ 605 CA ***(refd)***

Chor Phaik Har v. Choong Lye Hock Estates Sdn Bhd [1996] 4 CLJ 141 CA ***(refd)***

Chua Kim Suan v. Ang Mek Chong [1988] 3 MLJ 231 ***(refd)***

Du Sautoy v. Symes And Others [1967] 1 All ER 25 ***(refd)***

Eastern & Oriental Hotel (1951) Sdn Bhd v. Ellarious George Fernandez & Anor [1988] 1 LNS 161 ***(refd)***

Eagleview Limited v. Worthgate Limited and Another (Unreported) ***(refd)***

Edwards and Other v. Glyn and Others [1859] 2 EL & EL 29 ***(refd)***

English v. Dedham Vale Properties Ltd [1978] 1 All ER 382 ***(refd)***

Eves v. Eves [1975] 3 All ER 768 ***(refd)***

General (Rtd) Tan Sri Hashim Mohd Ali & Anor v. Francis MG Mirandah [2000] 4 AMR 4699 ***(refd)***

George Bray v. John Rawlinson Ford [1896] AC 44 ***(refd)***

Gissing v. Gissing [1971] AC 886 ***(refd)***

Gribbles Pathology (M) Sdn Bhd v. Adventist Hospital & Clinic Services (M) Bhd (No 2) [2003] 1 CLJ 317 HC ***(refd)***

Guthrie Sdn Bhd v. Trans-Malaysian Leasing Corp Bhd [1991] 1 CLJ 9; [1991] 1 CLJ (Rep) 155 SC ***(refd)***

Hock Hua Bank Bhd v. Leong Yew Chin [1987] 1 CLJ 126; [1987] CLJ (Rep) 126 SC ***(refd)***

Holder v. Holder and Others [1968] 1 Ch 353 ***(refd)***

A *Hong Leong Leasing Sdn Bhd v. Far East Knitting Sdn Bhd [1997] 1 CLJ 123 HC* ***(refd)***

Hussey v. Palmer [1972] 3 All ER 744 ***(refd)***

In re Barney. Barney v. Barney [1892] 2 Ch 265 ***(refd)***

In Re Rogers, Ex Parte Holland & Hannen [1891] 8 Morr 243 ***(refd)***

B *Inland Revenue Commissioners v. National Federation Of Self-Employed And Small Business Ltd (On appeal from Reg. v. Inland Revenue Commissioners, Ex parte National Federation of Self-Employed and Small Businesses Ltd) [1982] AC 617* ***(refd)***

Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor [1997] 4 CLJ 509 SC ***(refd)***

C *Jazuli Mohsin v. PP [1990] 1 CLJ 915; [1990] 2 CLJ (Rep) 165 HC* ***(refd)***

JT Smith and The Barrow Hematite Steel Company, Limited v. Henry Cooke, Rachel Swinnerton and Others [1891] AC 297 ***(refd)***

KGN Jaya Sdn Bhd v. Pan Reliance Sdn Bhd [1996] 2 CLJ 611 CA ***(refd)***

Khor Kuek Jin v. Hj Yasin & Ors [1976] 1 LNS 51 FC ***(refd)***

D *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor [1997] 3 CLJ 305 FC* ***(refd)***

Lee Hiok Woon & Ors v. Lee Hiok Ping & Ors [1993] 2 SCR 304 ***(refd)***

Leow Seng Huat v. Low Mui Yein [1996] 2 BLJ 466 HC ***(refd)***

Lim Kar Bee v. Duofortis Properties (M) Sdn Bhd [1992] 3 CLJ 1667; [1992] 1 CLJ (Rep) 173 SC ***(refd)***

E *Lim Yoke Kian & Anor v. Castle Development Sdn Bhd [2000] 4 CLJ 369 CA* ***(refd)***

Low v. Bouverie [1891] 3 Ch 82 ***(refd)***

Lysaght v. Edwards [1876] 2 Ch D 499 ***(foll)***

Lyus and Another v. Prowsa Developments Ltd & Others [1982] 1 WLR 1044 ***(refd)***

F *Mara v. Browne [1896] 1 Ch 199* ***(refd)***

Mohamed Ali v. PP [1962] 28 MLJ 230 ***(refd)***

MPM Murugappa Chetti & Anor v. The Official Assignee of Madras [1937] 1 LNS 38 PC ***(refd)***

Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***

G *Murugan v. Lew Chu Cheong [1980] 1 LNS 49* ***(refd)***

Ng Tien & Anor v. Chow Nim Yan [1990] 2 CLJ 937; [1990] 1 CLJ (Rep) 209 SC ***(refd)***

Othman & Anor v. Mek [1972] 1 LNS 103 FC ***(refd)***

H *Paragon Finance plc v. D B Thakerar & Co (a firm), Paragon Finance plc and Another v. Thimbleby & Co (a firm) [1999] 1 All ER 400* ***(refd)***

PP v. Abd Razak Johari [1990] 2 CLJ 1010; [1990] 2 CLJ (Rep) 672 HC ***(refd)***

PP v. Chew Yoo Choi [1989] 1 LNS 158 HC ***(refd)***

Rajoo Selvappan & Ors v. Abdul Bhari Kader Ibrahim & Ors [2005] 7 CLJ

I *326 HC* ***(refd)***

Raju Jayaraman Kerpaya v. Chung Khiaw Bank Ltd [1997] 3 CLJ 216 CA ***(refd)***

Registrar Of Titles, Johore v. Temenggong Securities Ltd [1976] 2 MLJ 44 ***(refd)***

Rochefoucauld v. Boustead [1897] 1 Ch 196 ***(refd)***

Soar v. Ashwell [1893] 2 QB 390 ***(refd)***

Tan Cheng Yam v. Emperee Sdn Bhd & Ors [1997] 3 CLJ 102 HC ***(refd)***

Teh Poh Wah v. Seremban Securities Sdn Bhd [1996] 4 CLJ 16 CA ***(refd)***

Temenggong Securities Ltd & Anor v. Registrar of Titles, Johore & Ors [1974] 1 LNS 175 ***(refd)***

Toovey v. Milne [1819] 2 B & ALD 682 ***(refd)***

UMW Toyota (M) Sdn Bhd v. Chow Weng Thien [1996] 5 MLJ 678 ***(refd)***

Waltons Stores (Interstate) Ltd v. Maher and Another [1988] 76 ALR 513 ***(refd)***

Wan Naimah v. Wan Mohamad Nawawai [1974] 1 MLJ 41 ***(refd)***

Yong Nyee Fan & Sons Sdn Bhd v. Kim Guan & Co Sdn Bhd [1978] 1 LNS 244 FC ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 114(g)

Limitation Act 1953, s. 22(1)(a), (b)

Rules of the High Court 1980, O. 15 r. 6(1), O. 45 r. 7, O. 20 r. 5(2), (3), (4), (5)

Other source(s) referred to:

Halsbury's Laws of England, 4th edn, pp 434 & 436, paras 980 & 981

Woodroffe & Amir Ali, *Law of Evidence*, 14th edn, p 2701

For the appellant - Porres R Royan (Michael CM Soo & Ong Boo Seng with him); M/s Shook Lin & Bok

For the respondent - Tommy Thomas (Chew Kherk Ying & Elaine Yap with him); M/s Wong & Partners

[Appeal from High Court, Kuala Lumpur; Civil Suit No: D4-22-1149-1993]

[Editor's note: For the High Court judgment, please see PT Indofood Interna Corp & Ors v. Far East Food Industries Sdn Bhd & Ors [2006] 7 CLJ 433.]

Reported by Suresh Nathan

JUDGMENT

Zaleha Zahari JCA:

[1] I have read the judgment in draft of my brother, Dato' Abdul Malik Ishak, and would like to state my reasons for dismissing this appeal.

[2] In this judgment parties will be referred to as they appear in the High Court.

[3] By civil suit filed on 13 October 1993 PT Indo Food Interna Corp (the 1st plaintiff), and PT Sanmaru Food Manufacturing Co (the 2nd plaintiff), applied for the following orders: The defendants to take all necessary steps to record the transfer of "Indomie" trade to the plaintiffs in accordance with deed assignment dated 26 September 1990. Delivery up of products bearing the trade marks "Indomie", "Top Mie", "Pop Mie", "Nutrimi-Yin Duo" (in Chinese) and "Indomie Mi Goreng" by the defendants to the plaintiffs. Delivery up of all samples, pamphlets, advertising material and other material documents and papers whatsoever sent to the defendants by the plaintiffs and relating to the plaintiffs' business which the defendants may have in their possession or control including all separate books of accounts and record kept or maintained by the defendants. The defendants be restrained from selling or in any way dealing with products of the plaintiffs bearing the trade marks "Indomie", "Top Mie", "Pop Mie", "Nutrimi-Yin Duo" (in Chinese) and "Indomie Mi Goreng". Damages with interest at 8% per annum from 13 October 1993 to the date of realization.

[4] Judgment in default of defence was entered against Far East Food Industries Sdn Bhd (in liquidation) (the 1st defendant), on 12 May 1994 for failure to file a defence. The 1st defendant has been wound up by order of court dated 17 October 1997 and the official receiver appointed as liquidator. The 1st defendant has taken no part in the trial and is not a party to this appeal.

[5] Several interlocutory applications were filed by both parties prior to trial of which the following requires mention. On 22 October 2002, the plaintiffs' solicitors filed an application on behalf of the 1st and 2nd plaintiffs and P.T. Indofood Sukses Makmur Tbk ("Sukses Makmur") to substitute Sukses Makmur for

the 1st and 2nd plaintiffs, on the ground that Sukses Makmur had taken over all of the rights and liabilities of the 1st and 2nd plaintiffs pursuant to a merger in Indonesia in 1994. A

[6] The 2nd and 3rd defendants opposed this application for substitution on the ground that there was insufficient evidence before the court and therefore unclear as to what were the rights, obligations, assets and liabilities of the 1st and 2nd plaintiffs which had been transferred to Sukses Makmur under the merger. This application to substitute Sukses Makmur for the 1st and 2nd plaintiffs was dismissed by the court on 25 April 2005. It is common ground that the appeal against this decision of the High court dated 25 April 2005 to the Court of Appeal was subsequently withdrawn by the plaintiffs. B C

[7] Having failed in the application for substitution, Sukses Makmur then, on 26 June 2005, filed an application under O. 15 of the Rules of the High Court 1980 (the Rules) to be joined as a plaintiff to the action, which application was also opposed by the 2nd and 3rd defendants. The High Court *vide* order dated 20 July 2005 allowed this application and Sukses Makmur was joined as a party to the action as the 3rd plaintiff. The 2nd and 3rd defendant's appeal against this decision of the High Court dated 20 July 2005 to the Court of Appeal *vide* Appeal No. W-02-968-2005, was dismissed. The Court of Appeal ruled that the issue of joinder should be determined at trial. D E F

[8] The plaintiffs' claim for the assignment of trade Mark No. M/100816, S/32614 and No. SAR/27,663 for the "Indomie" mark (collectively referred to as "the Indomie" mark) in Class 30 in Malaysia from the 2nd defendant to the 1st plaintiff is based on the following grounds. The 2nd defendant pursuant to the deed of assignment dated 26 September 1990 (the deed of assignment) had agreed to assign the "Indomie" mark to the 1st plaintiff for a consideration of 10 dollars. Alternatively the 2nd and 3rd defendants hold the "Indomie" mark in Malaysia as constructive trustees for the 1st plaintiff and are required to transfer the "Indomie" mark to the 1st plaintiff as and when they are directed to do so by the plaintiffs. G H

[9] The 2nd and 3rd defendant denied holding the "Indomie" trade marks as constructive trustees for the 1st plaintiff. They claimed that the 2nd defendant at all material times is the legal and beneficial owner of the "Indomie" trade mark and to having I

A acquired all of the goodwill, reputation and benefit of the said trade mark. The 2nd and 3rd defendants pleaded that the 2nd defendant had agreed to sell the "Indomie" trade mark to the 1st plaintiff (and not at the direction of the 1st plaintiff) and pursuant to a side letter dated 25 July 1990 (the side letter) the agreed B consideration was USD680,000 as stated in the side letter and that the 1st plaintiff was in breach of the said contract by failing to pay the sum of US$680,000.

The High Court Judge's Findings

C **[10]** The judge's findings on the agreed issues for determination will be taken in the following order.

[11] On Issue C, whether the 3rd plaintiff was properly joined as a party, the learned judge's finding was:

D

> 4. The issues whether the corporate restructuring has been completed or not are merely side issues easily resolved or made irrelevant to the determination of this action on the merits of the alleged assignment which is the subject matter of this action, by the inclusion of P.T. Indofood Sukses Makmur Tbk as the 3rd E Plaintiff, rather than to replace the 1st and the 2nd Plaintiffs, so that any decision applies to the Plaintiffs jointly and severally, and completion of their merger remains a matter between the Plaintiffs in Indonesia. That cannot be of any concern to the Defendants in Malaysia and the disposal of this action since ultimately the F sharing of the fruits, if any, of litigation in this action is a matter *inter se* between the Plaintiffs.
>
> 5. The addition of P.T. Indofood Sukses Makmur Tbk as the 3rd Plaintiff involves no delay or additional cost. In the event the 1st and the 2nd Plaintiffs are correct, they are entitled to the addition G of the 3rd Plaintiff. On the other hand, seeking to confine the Plaintiffs to the 1st and 2nd Plaintiffs may result in judgment obtained by the 1st and 2nd Plaintiffs being attacked at execution stage by collateral proceedings that the 1st and 2nd Plaintiffs no longer exist.
>
> H 6. Joinder of all three Plaintiffs in this action is not a case of having the wrong parties, but instead is to ensure that all the parties are before the Court. The only concern of the Court is that trial proceedings do not become an exercise in futility. By ensuring that all relevant parties are put before the Court, and any I order for or against the three Plaintiffs are made upon them jointly and severally, this action can be dealt with and disposed of without duplicity or multiplicity of proceedings, and with finality.

[12] On Issue A, as to what was the agreed consideration for the assignment of the "Indomie" trade mark registered in Malaysia from the 2nd defendant to the 1st plaintiff, whether RM10 as contended by the plaintiffs or US$680,000 as contended by the 3rd defendant, the learned judge first considered the 2nd and 3rd defendants contention that there was an alleged common practice upon the advise of tax advisers to state a nominal amount upon such assignment and his finding was as follows:

> 15. There is no evidence adduced of a common practice to state a nominal sum upon such assignments. Further, that it is for tax reasons together with the explanation of an agreement to keep actual consideration private and confidential, cannot for reasons of public policy, be accepted on their own as sufficient or probative evidence, since it would be encouragement of such practices to defraud the revenue. See *Lim Yoke Kian & Anor v. Castle Development Sdn Bhd* [2000] 4 CLJ 369 (CA). It is one thing to recognize that parties may in fact engage in such practices, but it is another for the Courts to endorse it by accepting it as evidence of much probative value.
>
> 16. … The issue before the Court is whether there is in fact such a side letter containing such an agreement. It is the Defendant who seeks to show there is such an agreement. A consideration that militates against finding there is such an agreement is that an agreement to defraud the revenue laws would be illegal. The role of the Courts is to give effect to the agreement between the parties and would therefore seek to avoid giving an interpretation that would make an agreement illegal without clear evidence.

[13] In making a considered decision on Issue A and B, as to (the consideration payable for the assignment of the "Indomie" trade mark and whether the 3rd defendant is a nominee or agent of the plaintiffs or a constructive trustee of the "Indomie" trade mark for the benefit of the 1st plaintiff and whether the 2nd defendants is a constructive trustee of the "Indomie" trade mark for the benefit of the plaintiffs), the judge considered the 2nd and 3rd defendants' claim that a side letter existed relating to an agreement to pay US$680,000 for executing the deed of assignment and arrived at the following findings:

> 20. … If such an important document as a side letter which is worth USD680,000.00 to the Defendants compared to the assignment at USD10.00, is enclosed, one would expect the covering letter to refer or mention the side letter if enclosed. The reasons given for having two separate documents does not apply

A to a mere covering letter to forward such documents. Yet no mention of the side letter was made in the covering letter that purportedly forwarded it. Indeed the covering letter of 25.7.1990 is inconsistent with the testimony above of the 3rd Defendant. Hence, the testimony of the 3rd Defendant must be treated with some caution, including whether the purported side letter produced by the Defendants is a copy of the side letter.

21. With no other direct evidence of a side letter, the sub-stratum of the defence disappears, with the result it must collapse, unless the Defendants could lean for support on other, *albeit* indirect, evidence to prove such side letter existed.

[14] On whether there was any indirect evidence of such a side letter the judge held:

24. … The silence on the payment of USD680,000.00 for the assignment is inconsistent with there being a side letter to that effect. Even if the matter was held in abeyance because of an injunction by Boustead, one would ordinarily expect it to be raised when the injunction was lifted. The 3rd Defendant's letter of 18.9.1992 to Hadi Wijaya does not contain any mention of the side letter. Nor is there any evidence that as a result of the letter from Hadi Wijaya, the 3rd Defendant took the matter up with Hendy Rush with whom the side letter was purportedly agreed.

[15] On the 2nd and 3rd defendants contention that the plaintiffs should have called Hendy Rusli as their witness the judge's ruling was:

34. The notarised Affidavit of Hendy Rusli was put before the Court. Its authenticity was never challenged. He denied receiving the side letter. He said he believed it to be a concocted document. It is the Defendants who would seek him to confirm there was a side letter containing such an agreement in order to establish its defence. He was not called as a witness by the Plaintiffs as he had left the employment of the Plaintiffs, resided in Jakarta and said that available to come as a witness. Since he cannot be compleed to appear before this Court, section 114(g) of the Evidence Act 1950 should not be applied and therefore no inferences adverse to the Defendants should be drawn either from his affidavit or the non-calling of Hendy Rusli by the Defendants, and since the Affidavit of Hendy Rusli has not been tested by cross-examination, the Court exercises caution, by examining for corroboration by other evidence before accepting any part of it for either party. In this case, the findings of the Court in relation to the existence of non-existence of the side letter have not relied upon the Affidavit of Hendy Rusli at all.

35. Indeed, since it is the Defendants who contend that the consideration of USD680,000.00 was discussed and agreed upon between the 3rd Defendant and Mr. Hendry Rusli, the latter representing the 1st Plaintiff, the onus is upon the Defendants. Apart from the testimony of the 3rd Defendant, there is no other evidence of discussion and agreement for a consideration of USD680,000.00 for the assignment or that any such proposal came from Mr. Hendy Rusli or the Plaintiff for the benefit of the 2nd Defendant. The covering letter said to be sent when the assignment and the side letter were forwarded did not support the Defendants' version. Since the testimony of the 3rd Defendant is contradicted by his own evidence, the occasion did not arise for the Plaintiffs to have to call Hendy Rusli to deny any such alleged agreement in a purported side letter.

[16] On Issue B para 2, (whether the 3rd defendant was an employee of the Indofood Group of companies and taking instructions from the group) the judge finding was:

39. The assignments were signed by the 3rd Defendant as General Manger/Director of the 2nd Defendant. On 19.8.1992 the 3rd Defendant wrote to Indofood International Division a Regional General Manager ASEAN under the letterhead of the 1st Defendant. While there is nothing to prevent the owner of the shares of a company from being employed by the company, the designated general manager or regional general manager indicates that he is an employee of the 1st and 2nd Defendants. Then there was constant communication with the 1st Plaintiff for administrative matters, including his terms of employment. On the totality of the evidence before the Court, the actions of the Defendants show that they were conducted on the basis that the 1st and 2nd Defendants were part of the Indofood group.

[17] The judge then in respect Issue B para 2 made a finding of fact, that the 2nd defendant held the "Indomie" mark in Malaysia in its name on constructive trust for the 1st plaintiff and was required to transfer the "Indomie" mark to the 1st plaintiff as and when directed to do so by the 1st plaintiff.

[18] The judge summarized his findings and his conclusion on Issues A and B are as follows:

40. To summarise, the finding of this Court is that the assignments themselves are not disputed, but recordal of the assignments of the "Indomie" mark had been withdrawn by the 2nd Defendant, who only well after the retraction of the recordal and after the commencement of this action seek to maintain there

was a breach by the 1st Plaintiff of an agreement incorporated in a purported side letter, to pay USD680,000.00 as consideration for the assignment to the 1st Plaintiff of the mark "Indomie" registered in the name of the 2nd Defendant. The Defendants' assertion of the existence of that side letter and agreement therein is not borne out either by direct evidence or indirectly by inference from surrounding facts and circumstances. The Defendants, therefore, failed to discharge the onus that is upon them to prove upon a balance of probabilities that there is an agreement between the 1st Plaintiff and the 2nd Defendant to pay the latter USD680,000.00 as consideration. Since there is no evidence of any side letter containing an agreement to pay USD680,000.00 to the 2nd Defendant there was no reason for the 2nd Defendant to direct Shearn Delamore & Co not to proceed with the recordal of the assignment which had been executed and submitted for recordal to their solicitors by the 2nd Defendant.

41. It is clear that the issue of payment of USD680,000.00 before recordal of assignment never arose when the 2nd Defendant engaged Shearn Delamore & Co to effect the assignment. It is equally clear that it was the 3rd Defendant himself who had represented that the recordal could not be effected because of an injunction by Boustead. That was on 18.9.1992 since the injunction had been lifted there was no longer any impediment to recordal of the assignment of the mark "Indomie". At no point until this action was the reason of non-payment of USD680,000.00 given for refusal to proceed with the assignment. Indeed upon the 2nd Defendant having executed the assignment, neither the 2nd nor the 3rd Defendants had any further personal role in the recordal of the assignment except to act on behalf of the 1st Plaintiff to engage solicitors to proceed with the recordal of the assignments. In instructing the retraction the Defendants acted without authority of the 1st Plaintiff. These conclusions support the finding that at all times the 2nd Defendant held the registration of the mark "Indomie" in its name under a constructive trust.

[19] On Issue D, in dealing with the 2nd and 3rd defendant's allegation that the plaintiffs were guilty of prolonged, inordinate and inexcusable delay in not filing summons for directions and/or setting this action down for trial, the judge held:

43. Indeed the summons for directions would have served little purpose since the action could not be brought to trial until the interlocutory applications were disposed off, including applications to strike out certain portions of the Affidavit of the 3rd Defendant and to strike out the Defence.

...

...

44. The Court finds no merit in these submissions of the Defendants on these procedural issues and holds that in the particular circumstances of this case, the defence of delay and laches is not sustainable since while the delay is prolonged, it is in all the circumstances not inordinate or inexcusable, and the Plaintiffs are not entirely to blame.

45. While a defendant is entitled to defend itself, in this case every possible objection and issue appear to be raised when the merits involve only the question of the nature of the assignment which was executed, delivered, submitted to solicitors for recordal of the assignment and subsequently retracted by, the 2nd Defendant. The matter was pursued, action was filed and has been before the court.

[20] On the issue of costs, and the 2nd and 3rd defendants contention that the case did not involve complex issues of law and fact and the plaintiffs have not given any good reasons why this is a proper case to issue a certificate for two counsels, the judge was of the view that:

47. ... had the Defendants sought more senior and experienced counsels, this case would have proceeded to the issues on merits more expeditiously and economically. The full record of proceedings in the trial file would show that the defence was not conducted with a view to obtaining a fair and just decision in an expeditious and economical manner, but sought to raise issues at every turn and stage. The Plaintiffs' counsel had to thread a very fine line between keeping the case focused on the issue of merits, yet at the same time to answer each and every argument raised on every possible issue. Indeed the Court had to act firmly at case management stage to bring this case to trial, and in the trial to bring it to a close. The Court finds that this case warrant the award of costs for two lawyers.

[21] The judge then entered judgment for the plaintiffs in terms of prayers A, B, D, E and G of the amended statement of claim.

[22] It is now necessary to consider whether the trial judge was right in his findings and in arriving at the conclusions which he did on the agreed issues for determination. I don't propose to set out the background facts as these have been exhaustively set out in the judgment of my brother, Dato' Abdul Malik Ishak.

Decision

Issue C

[23] I will deal with Issue C first.

[24] On the 2nd and 3rd defendants contention that there is no clear evidence as to the alleged rights, obligations, assets and liabilities of the 1st and 2nd plaintiffs which had been transferred to the Sukses Mamur, the majority of the corporate merger documents relied on by the plaintiffs including those exhibited in the affidavit of Ignatius Andy Andria dated 19 February 2003 have been reviewed by the defendants' own Indonesian law expert, Linda Widyati, who, by affidavit affirmed on 4 November 2003 confirmed that Sukses Makmur would have taken over all the assets, rights and obligations, including all legal actions of, *inter alia*, the 1st and 2nd plaintiffs as a result of the merger.

[25] The trial judge was of the view that the inclusion of Sukses Makmur as the 3rd plaintiff, rather than replace the 1st and 2nd plaintiffs, was appropriate as any decision made would apply to the plaintiffs jointly and severally. That completion of the merger was a matter between the plaintiffs in Indonesia and that cannot be of any concern to the defendants in Malaysia since ultimately, the sharing of the fruits of litigation in this action is a matter *inter se* between the plaintiffs. I agree with these views expressed by the learned judge.

[26] On the allegation that the joinder of Sukses Mamur was barred by limitation, the powers of the court under O. 20 r. 5, read together with O. 15 r. 6, of the Rules include the power to give leave to add a party or to amend any pleading even after the expiry of any relevant period of limitation (sub-rule (2)) or to add a new cause of action (sub-rule 5). O. 20 r. 5 states as follows:

(1) Subject to Order 15 Rules 6, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend the writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

(2) Where an application to the Court for leave to make the amendment mentioned in paragraph (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.

(3) An amendment to correct the name of a party may be allowed under paragraph (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued.

(4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under paragraph (2) if the capacity in which, if the amendment is made, the party will sue is one in which at the date of issue of the writ or the making of the counterclaim, as the case may be, he might have sued.

(5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment.

[27] Further, in the present case, the plaintiffs are claiming to recover trust property from the defendants. By virtue of s. 22(1) of the Limitation Act 1953, an action by a beneficiary comes within the circumstances stated in para (a) or (b) of s. 22, ie, there is no period of limitation.

[28] In respect of the appellants' counsel submission that the 1st and 2nd plaintiffs having been dissolved and liquidated as at March 1984 and no *locus standi* before the High Court, nor on appeal before this court, the liquidator of the 1st plaintiff, Hadi Widjaya, by affidavit affirmed on 22 May 2003 in the joinder

application, averred that "the process of liquidation has not been entirely completed." A similar statement was made by the liquidator of the 2nd plaintiff, Aufrans, in his affidavit, also affirmed on 22 May 2003.

[29] Similar to Malaysian company law, there is clearly a difference between a company that is in liquidation (and managed by a liquidator) and a company that is dissolved (not requiring any management). In the instant case, the 1st and 2nd plaintiffs were merely under liquidation, they are therefore entitled to sue.

Issue A And B

[30] In determining these two issues the learned judge had clearly examined the contemporaneous documents exchanged between the parties and their solicitors from 25 July 1990 to 24 March 1993. The judge was clearly right in ruling that the onus lies on the 2nd and 3rd defendants to prove their defence that the consideration for the assignment of the "Indomie" trademark was US$680,000.

[31] The judge arrived at the findings which he did and ruled in favour of the plaintiffs based on the following documents. The covering letter under the letterhead from the 1st defendant dated 25 July 1990 (signed by the 3rd defendant) addressed to "P.T. Indofood Interns Corp" to the 1st plaintiff for attention of Mr. Henry Rusli encl. 2 Deeds of Assignment and Forms of Authorisation of Agent reads as follows:

> Please find enclosed two Deed of Assignments for transfer of the above Trade Mark Registration in Class 30 in Malaya, Sabah & Sarawak and in Brunei together with two authorisation forms for your signature.
>
> Kindly attach the Common Seal on the Deed of Assignment and return all the documents for our further action
>
> Thank you and regards.
>
> Yours faithfully
>
> Far East Food Industries Sdn Bhd
>
> Sgd
> Yeoh In Beng
> General Manager.

[32] On 26 September 1990, the deeds of assignment were executed by both parties, with 3rd defendant signing on behalf of 2nd defendant. The deed of assignment expressly states that the consideration is RM10.

[33] There is then a letter dated 2 October 1990 from Shearn Delamore & Co. to the 2nd defendant enclosing an Invoice for services rendered with regard to the assignment in question. The 1st defendant then issued a note to 1st plaintiff enclosing Shearn & Delamore's invoice. The 1st plaintiff subsequently paid this invoice. Indofood Group then issued letter dated 29 January 1991 to the 1st and 3rd defendant enquiring as to the progress of the transfer of the trademark. The 1st defendant issued letter dated August 1992, (signed by the 3rd defendant) to 1st plaintiff enclosing "Indomie" trade mark registration certificate.

[34] The question of assignment re-emerged on 26 August 1992 when Hadi Wijaya from Indofood Group wrote to the 1st and 3rd defendant enquiring as to the status of the transfer of the "Indomie" trade mark as follows:

> Dear Yeoh,
>
> Please advise me asap the status of the "Indomie" Trademark M/100816 under the name of Sanmaru Marketing Overseas which is suppose-to be transfer to P.T. INDOFOOD INTERNA CORPORATION.
>
> Up to date we haven't received any documents confirming the transfer except for the Invoice of Shearn Delamore dated 23rd October 1990.
>
> Yours truly,
>
> Sgd
> Hadi Wijaya.

[35] The reply from the 1st defendant signed by the 3rd defendant by letter dated 18 September 1992 to Indofood Group was:

Attn: Mr. Hadi Wijaya

Dear Sir,

We refer to the trademark of Indomie in Malaysia and wish to inform that Sanmaru Overseas Marketing is still the registered owner of the said trademark for Malaysia and Brunei.

I believe the High Court Injunction taken by Boustead in 1991 in view of the payment dispute which has now been resolved has prevented any transfer of the trademark.

Thank you.

Yours faithfully,
Far East Food Industries Sdn Bhd

Sgd

Yeoh Jin Beng
Regional General Manager-Asean.

[36] On 16 February 1993 Indofood Group inquired from Messrs Shearn & Delamore as to the status of the assignment of the "Indomie" mark as follows:

Re: Invoice No. A 70072

Please advice us accordingly the status of the assignment of "Indomie & Device" trademark from Sanmaru Overseas Mkt Sdn Bhd which was supposed to be transfered to PT. Indofood Interne Corp as stipulated in your invoice No. A 70072 dated 23th October 1990.

We request your direct explanation to us since we understood that all assignment documentation already been properly executed and submitted to you accordingly.

Your prompt reply will be very much appreciated.

Yours truly

Sgd.
Hadi Wiijaya.

[37] The reply from Messrs Shearn Delamore & Co to Indofood Group, *vide* letter dated 24 March 1993 states as follows:

> I refer to your letter of 16th February, 1993.
>
> Our records show that our instructing clients are Sanmaru Overseas Marketing Sdn. Bhd.
>
> In the light of the solicitor – client relationship we would advise that you communicate with them on this matter. Suffice it for us to say that our records show that the pending recordal of the Assignment has been retracted.

[38] The first reference to the sum of US$680,000 was made by the 3rd defendant in an affidavit affirmed on 26 October 1993 (about three years after the alleged agreement between him and one Hendy Rusli) filed in an interlocutory injunction proceedings after the writ in this civil suit was issued on 13 October 1993. In that affidavit, the 3rd defendant exhibited a letter dated 25 July 1990 which he claimed was sent to Hendy Rusli where reference was made to an alleged agreement reached with the said Hendy Rusli. The second paragraph of the side letter purportedly reads as follows:

> I have discussed and persuaded the shareholders of SOM to agree to your proposal to buy over the Indomie trade mark and device for a total consideration of US$680,000.00 (United States Dollars Six Hundred and Eighty Thousand Only).

[39] Hendy Rusli in an affidavit in reply affirmed on November 1993, denied receiving such a letter implying denial of the existence such an agreement.

[40] Cesar De La Cruz (PW1) in his capacity as a member of the management committee of the Salim Group overseeing its investment in the food division, testified he never saw the side letter at the time. PW1 referred to the sworn affidavit of Hendy Rusli where at paras 6(a) and 6(c) Hendy Rusli stated that "exh. YJB6 (the side letter) is a document which I never received and I assume to be an afterthought I am advised and verily believe that the exh. YJB6 (the side letter) is a concocted document". The authenticity of the side letter was clearly challenged by the plaintiffs from the time of its first appearance as an exhibit in the defendants' affidavit affirmed on 26 October 1993.

[41] The appellants' counsel submitted that the trial judge erred in finding that there was no evidence of any side letter containing an agreement to pay US$ 680,000 by reason as the 3rd defendant had given oral evidence to that effect. It was argued that in the

absence of any evidence to contradict the 3rd defendants testimony, the 3rd defendant's evidence must be held to be unchallenged. According to the appellants' counsel the trial judge had erred in not invoking s. 114(g) Evidence Act 1950 against the plaintiffs for failure to call Hendy Rusli as a witness, and that it must be presumed that had Henry Rusli given evidence his evidence, would support the defendants' version.

[42] Why Hendy Rusli was not called as a witness was, as testified by PW1 at trial, because Hendy Rusli was no longer in the plaintiffs employ, resides in Jakarta and not able to be present in Malaysia. The respondent's counsel in reply argued that the authenticity of Hendy Rusli's affidavit of 9 January 1993 was not challenged by the defendants and the affidavit has been admitted as part of the body of evidence during trial. Hendy Rusli's affidavit has been referred to by the plaintiffs during the cross examination of "D37". It is then up to the trial court to determine the truth of the contents of this affidavit in totality with the other evidence. (See *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor* [1997] 4 CLJ 509 per the judgment of Peh Swee Chin FCJ.

[43] The trial judge's ruling on this issue was that an adverse inference should not be drawn against the plaintiff for failure to call Hendy Rusli as a witness as there is no evidence of any withholding or suppressing of evidence on the part of the plaintiffs. That, it cannot be presumed, that if Hendy Rusli, if called, would give evidence unfavourable to the plaintiffs. The position taken by the trial judge was, as to the existence or non existence of the side letter that he would not be relying upon the affidavit of Hendy Rusli but would be undertaking an analysis of the evidence presented before the court. Based on the totality of the evidence before him the judge's finding was that the defendants had failed to prove the existence of the alleged side letter and had accordingly failed to establish their defence.

[44] The judge's assessment of the credibility of the 3rd defendant, whether the 3rd defendant had the capacity to enter into such an oral agreement during that period with Hendy Rusli, based on the documents before him, by reason of the degree of integration and close managerial control exercised by Jakarta over the day to day operations of its Malaysian subsidiaries and the 3rd defendant's freedom to manage matters in Malaysia was limited as

Jakarta's permission had to be obtained even for routine matters, arrived at the conclusion that parties had conducted themselves on the basis that the 1st and 2nd defendants were part of the Indofood Group.

[45] The judge then rejected the 3rd defendant's (a middle-ranking employee in the Group) contention that he was negotiating at arms length and was in a position to reach an oral agreement with a superior officer in the corporate hierarchy, Hendy Rusli, which agreement required the Indofood Group to pay US$680,000 to him.

[46] The approach adopted by the learned judge on this issue was clearly right and he was fully justified for the reasons advanced in the judgment in arriving at the conclusion which he did on this issue.

[47] The 3rd defendant's unequivocal admission that the alleged oral agreement between himself and Hendy Rusli was intended to conceal the true consideration of US$680,000 in order for the 2nd defendant to avoid disclosing receipt of these monies to defraud revenue was rejected by the judge on the ground that this defence cannot be upheld as the court would in so doing, be countenancing an illegal act of the 2nd defendant. (See *Lim Yoke Klan & Anor v. Castle Development Sdn Bhd* [2000] 4 CLJ 369 the Court of Appeal considered *Lim Kar Bee v. Duofortis Properties (M) Sdn Bhd* [1992] 3 CLJ 1667; [1992] 1 CLJ (Rep) 173 SC a scheme devised by a tax consultant to avoid payment of estate duty).

[48] The evidence the 2nd defendant instructing Shearn Delamore & Co to proceed with the filing of the signed assignment documents with the registry (notwithstanding the alleged non-receipt of the USD680,000) was indeed significant. The fact was that the 3rd defendant continued for some 2 1/2 years thereafter to represent to the plaintiffs that the recordal of the assignment was pending. By this conduct, the judge was therefore right in finding that the defendants' version does not represent the truth, is neither credible nor believable and the judge in rejecting it.

[49] The transfer of the Indomie trade-mark registered in Malaysia from the 2nd defendant to the 1st plaintiff, from PW2's testimony, demonstrates that it is not as an isolated agreement. It forms part of a complex joint venture agreement between two of Indonesia's

largest corporate groups. Just as the consideration for the Indonesian assignments was nominal – (10,000 rupiah), so too was the consideration for the Malaysian assignment. Logic would suggest that in such circumstances the consideration would be nominal.

[50] The deed of assignment was executed by both parties on 26 September 1990. The deed states that the consideration of 10.00 was "paid by the assignees (the 1st plaintiff) to the assignors (the 2nd defendant), the receipt whereof the assignors hereby acknowledge". The 2nd defendant is estopped from denying that the plaintiff had paid the declared consideration of RM10. In such circumstances, pending the registration of the assignment of the trademark, the position in equity was described in *Lysaght v. Edwards* [1876] 2 Ch D 499 by Lord Jessel M.R. as follows:

> It appears to me that the effect of a contract for sale has been settled for more than two centuries; ... What is that doctrine? It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase money, a charge or lien on the estate for the security of that purchase money, and a right to retain possession of the estate until the purchase money is paid, in the absence of express contract as to the time of delivering possessions. It must, therefore, be considered to be established that the vendor is a constructive trustee for the purchaser of the estate from the moment the contract is entered into.

[51] This equitable principle was accepted by the Federal Court in *Temenggong Securities Ltd & Anor v. Registrar of Titles, Johore & Ors* [1974] 1 LNS 175, with H.S. Ong FJ observing:

> In our view there can be no doubt as to the position in law. As was said by Jesse! M.R. in *Lysaght v. Edwards* …
>
> The law is clear that the vendors, after receipt of the full purchase price and surrender of possession of the lands to the appellants are bare trustees for the appellants of the said land and it must consequently follow, as night must day, that the vendors have no interest in the lands which can be the subject matter of a caveat.

The Federal Court decision in *Temenggong Securities* was upheld by the Privy Council on appeal, but this passage was not commented upon.

[52] It follows that from 26 September 1990, the 2nd and/or 3rd defendants were holding the Indomie trade-mark in Malaysia as constructive trustee for the benefit of the plaintiff. In these circumstances the High Court was right to find on a balance of probabilities to conclude on Issue A and B that the agreed consideration was RM10, and that the 2nd and 3rd defendants acted wrongfully and in breach of agreement in failing to complete the transfer. He was also right in concluding that the 2nd and 3rd defendants were holding the "Indomie" trade-mark in constructive trust for the benefit of the plaintiffs.

Issue D

[53] I am in agreement with the judge that the defendants had contributed to the delay in disposal of the action by raising procedural objections and issues. By reason of the numerous interlocutory applications (and appeals to the Court of Appeal) filed on behalf of both parties in this suit, it was not open for the defendants to level such accusations against the plaintiffs of being guilty of inordinate delay in setting this suit for trial. On the contrary, it was the defendants, particularly in the few months leading up to the commencement of trial on 24 October 2004, intent to prevent the commencement of trial, including unsuccessfully making stay applications in the Court of Appeal. The learned judge was therefore right in finding that the plaintiffs are not guilty of conduct disentitling them to relief by reason of delay and/or laches.

Costs

[54] The award of costs is discretionary. The judge considered it appropriate in the circumstances of this case to award costs for two counsel. The judge had applied the right principles and there is no reason for this court in exercise of its appellate jurisdiction to interfere with the exercise of that discretion.

Conclusion

[55] The reasoning of the trial judge in arriving at the findings and the conclusions which he did were cogent and in accord with the evidence. Having had the audio-visual advantage of having seen and heard the witnesses, having duly considered the evidence and the probabilities of the case taken as a whole, taking into consideration the documents presented, and the circumstances of the case, I am in agreement with his findings and conclusion.

[56] The appeal is dismissed with costs. The deposit to respondents to account of taxed costs.

Abdul Malik Ishak JCA:

Introduction

[57] Before the High Court, there were three defendants, namely:

(a) Far East Food Industries Sdn Bhd (dalam likuidasi).

(b) Sanmaru Overseas Marketing Sdn Bhd.

(c) Yeoh Jin Beng.

[58] The first defendant (Far East Food Industries Sdn Bhd (dalam likuidasi)) did not file a defence and judgment was entered against it on 12 May 1994 and it was subsequently ordered to be wound up. Before us only the second defendant (Sanmaru Overseas Marketing Sdn Bhd) and the third defendant (Yeoh Jin Beng) appealed against the decision of the High Court.

[59] The first defendant (Far East Food Industries Sdn Bhd (dalam likuidasi)) took no part in the trial before the High Court and is not a party to this appeal.

[60] The second defendant (Sanmaru Overseas Marketing Sdn Bhd) was incorporated under the laws of Malaysia on 21 July 1983. The first subscribers to the Memorandum and Articles of Association were Djajadi Djaja, Teoh Sik Hwa @ Chao Sik Hwa and the third defendant (Yeoh Jin Beng).

[61] The third defendant (Yeoh Jin Beng) was, at all material times, a director and general manager of the first defendant (Far East Food Industries Sdn Bhd (dalam likuidasi)).

[62] I will now set out the particulars of the plaintiffs. The first plaintiff (P.T. Indofood Interna Corp.) was incorporated on 20 July 1984 under the laws of Indonesia. The first subscribers to the Memorandum and Articles of Association were Djajadi Djaja, Pandi Kusuma, Ulong Sanjaya, Hendy Rusli, Sudwikatmono, Ibrahim Rishad, Anthony Salim and Teddy Djuhar.

[63] The second plaintiff (P.T. Sanmaru Food Manufacturing Co. Ltd) was incorporated on 27 April 1970 under the laws of Indonesia. The first subscribers to the Memorandum and Articles of Association were Djajadi Djaja, Harry Gandi, Darmawan Tedja, Tjandra Sudi Rahardja, Lim Weng Ngak, Wirendjaja Ganda, Sudjana and Tedja Sukmana.

[64] The third plaintiff (P.T. Indofood Sukses Makmur Tbk) was incorporated under the laws of Indonesia known as P.T. Panganjaya Intikusuma on 14 August 1990. The first subscribers to the Memorandum and Articles of Association were Pandi Kusuma, Hendy Rusli and Anthony Salim. It became, in 1994, a public company and changed its name to P.T. Indofood Sukses Makmur. Again, on 24 June 1997, the Articles of Association of P.T. Indofood Sukses Makmur were amended and its name was changed for the second time to that of the third plaintiff (by the insertion of the last word "Tbk").

[65] For convenience, the parties shall be referred to in the same manner as they were referred to in the High Court. The parties will be described as the plaintiffs and the defendants accordingly.

The Two Groups

[66] There were two main groups which ventured into instant noodles businesses. They were the Salim group and the Jangkar Jati group.

[67] The Salim group was founded by Liem Sioe Liong, also known as Soedono Salim in the 1940s. In 1992, his son, Anthony Salim took over the management and he held the posts of the President and Chief Executive Officer of the Salim group. The other members of the Salim group included Sudwikatmono, Ibrahim Rishad and Teddy Djuhar. The Salim group's foray into the instant noodles business in Indonesia started with the incorporation of P.T. Sarimi Asli Jaya (better known as "P.T. Sarimi") under the laws of Indonesia in 1979 and the launching of the "Sarimi" brand of instant noodles. At the time of its launch, there were already in existence two popular brands in the Indonesian market – the "Supermie" and the "Indomie" brands.

[68] The Jangkar Jati group was founded by Djajadi Djaja and the Indonesian "Indomie" trade mark was registered in the name of Djajadi Djaja. Now, the instant noodles operations of the Jangkar Jati group were carried out in Malaysia through the corporate

vehicles of the first defendant (Far East Food Industries Sdn Bhd (dalam likuidasi)) and the second defendant (Sanmaru Overseas Marketing Sdn Bhd).

[69] Djajadi Djaja had incorporated the second defendant (Sanmaru Overseas Marketing Sdn Bhd) in Malaysia on 21st July 1983. Djajadi Djaja had coined the "Indomie" trade mark and beneficially owned it in Indonesia, Malaysia and Singapore. Even before the second defendant (Sanmaru Overseas Marketing Sdn Bhd) applied for registration of the "Indomie" trade mark in Malaysia in 1983, Djajadi Djaja had already transferred and assigned all his rights and interests in the Malaysia "Indomie" trade mark to the second defendant (Sanmaru Overseas Marketing Sdn Bhd).

The Joint Venture Between The Two Groups

[70] A joint venture and corporate re-structuring exercise involving the Jangkar Jati group and the Salim group was implemented and this resulted in the two groups taking cross – holdings of each other's instant noodles operations. This was in 1984. The first plaintiff (P.T. Indofood Interna Corp.) was incorporated by the two groups as the joint venture and management company with 57.5% of its equity held by the Jangkar Jati group with the balance of 42.5% held by the Salim group.

[71] Prior to 1984, the first defendant (Far East Food Industries Sdn Bhd (dalam likuidasi)) and the second defendant (Sanmaru Overseas Marketing Sdn Bhd) were the manufacturing and marketing arms of the Jangkar Jati group's instant noodles operations in Malaysia. This arrangement ceased following the joint venture and corporate re-structuring exercise in 1984 when the first plaintiff (P.T. Indofood Interna Corp.) took over as the joint venture vehicle and management company for the consolidated instant noodles businesses of the Jangkar Jati group and the Salim group.

[72] Again, prior to 1984, the first defendant (Far East Food Industries Sdn Bhd (dalam likuidasi)) and the second defendant (Sanmaru Overseas Marketing Sdn Bhd) were financed entirely by the Jangkar Jati group. But after the joint venture, the first plaintiff (P.T. Indofood Interna Corp.) took over all the financial responsibilities in relation to the affairs of the first defendant (Far East Food Industries Sdn Bhd (dalam likuidasi)) and the second

defendant (Sanmaru Overseas Marketing Sdn Bhd). Of significance would be this. That the third defendant (Yeoh Jin Beng) reported to and took instructions and directions from the first plaintiff (P.T. Indofood Interna Corp.) as well as the Indofood group generally.

[73] It can be surmised that the joint venture between the two groups, in practical terms, increased the scale of integration and close managerial control exercised by the first plaintiff (P.T. Indofood Interna Corp.) over the day to-day Malaysian operations of the first defendant (Far East Food Industries Sdn Bhd (dalam likuidasi)) and the second defendant (Sanmaru Overseas Marketing Sdn Bhd).

[74] It was agreed, as part of the joint venture between the two groups, that all snack food and instant noodles brands/trade marks including the "Indomie" and other brands/trade marks previously registered in the names of Djajadi Djaja, the second defendant (Sanmaru Overseas Marketing Sdn Bhd) and all other companies in Indonesia and elsewhere, would be owned by the first plaintiff (P.T. Indofood Interna Corp.) This would foster integration and rationalise the operations of the two groups.

[75] Under the joint venture exercise, the third defendant (Yeoh Jin Beng) was to effect the transfer of the brands/trade marks registered in the names of the first defendant (Far East Food Industries Sdn Bhd (dalam likuidasi)) and the second defendant (Sanmaru Overseas Marketing Sdn Bhd) including the Malaysia "Indomie" trade mark as and when directed by the first plaintiff (P.T. Indofood Interna Corp.) – being the joint venture and management company of the merged snacks and instant noodles businesses of the two investor groups, at nominal consideration. And by a notarial deed dated 15 December 1991, the first plaintiff (P.T. Indofood Interna Corp.) acquired all of Djajadi Djaja's shares, interests and rights in the first defendant (Far East Food Industries Sdn Bhd (dalam likuidasi)). The Salim group propelled ahead and by June 1992 it acquired 100% ownership and control of the first plaintiff (P.T. Indofood Interna Corp.) and the second plaintiff (P.T. Sanmaru Food Manufacturing Co. Ltd) and P.T. Sarimi.

A **The Re-structuring In 1994**

[76] Now, pursuant to an extraordinary general meeting of the shareholders held on 1 March 1994, it was resolved that the first plaintiff (P.T. Indofood Interna Corp.) and the second plaintiff B (P.T. Sanmaru Food Manufacturing Co. Ltd) along with sixteen (16) other companies which were part of the Indofood group, would be merged and jointly merged by one holding entity by the name of P.T. Indofood Sukses Makmur and that would be the third plaintiff. It was resolved, *inter alia*, that:

C

> All rights and obligations of the COMPANIES (i.e. the companies within the Indofood group which merged) shall become the rights and obligations of ISM (i.e. P.T. Indofood Sukses Makmur) with no exception, as of the date of the joint management, being the first day of January one thousand nine hundred and ninety four D (1.1.1994).

And it was further resolved that:

> All assets and liabilities owned by the COMPANIES (i.e. the companies within the Indofood group which merged) as detailed E in the balance sheet dated the thirty first day of December one thousand nine hundred and ninety three (31.12.1993) ... shall become the assets and liabilities of ISM (i.e. P.T. Indofood Sukses Makmur).

[77] By virtue of this resolution, all the rights and obligations, F assets and liabilities of the first plaintiff (P.T. Indofood Interna Corp.) and the second plaintiff (P.T. Sanmaru Food Manufacturing Co. Ltd) became the rights and obligations, assets and liabilities of and liabilities of P.T.Indofood Sukses Makmur with effect from 1 January 1994 including the rights of action associated with the G Malaysian "Indomie" trade mark which is the subject matter of this appeal.

Decision Of The High Court

H **[78]** After a full trial, the High Court gave judgment to the plaintiffs and ordered the defendants to take all the necessary steps within 14 days of the order of the High Court to record the transfer of the Indomie trade mark to the plaintiffs in accordance with the terms of the deed of assignment dated 26 September I 1990, failing which the senior assistant registrar be authorised to execute all the relevant documents to effect the said transfer. The

High Court also ordered that the first and the third defendants to transfer all the trademarks presently registered in the first defendant's name to the first plaintiff within 14 days of the order of the High Court and failing which the senior assistant registrar be authorised to execute all the relevant documents to effect the said transfer. The High Court further ordered that the defendants to forthwith deliver to the plaintiffs, its servants, agents all the products of the plaintiffs in its possession, control including but not limited to the products bearing the trade name Indomie, Top Mie, Pop Mie, Nutrimi – Yin Duo (in Chinese) and Indomie Mi Goreng. The High Court further ordered the defendants to deliver to the plaintiffs, its servants, agents all samples, pamphlets, advertising materials and other materials, documents and papers whatsoever sent to the defendants by the plaintiffs and relating to the plaintiffs' business which the defendants, their agents may have in their possession or under its control including all the separate books of accounts and records kept or maintained by the defendants. The High Court further ordered that the defendants be restrained from selling or in any way dealing with the products of the plaintiffs but not limited to the products of the plaintiffs bearing trade names of Indomie, Top Mie, Pop Mie, Nutrimi – Yin Duo (in Chinese) and Indomie Mi Goreng. The High Court further ordered that an inquiry as to damages and payment of all sums by the second and the third defendants to the plaintiffs, found due upon taking such an inquiry, together with interest thereon at 8% per annum from 13 October 1993 to the date of realisation. The High Court also ordered the defendants to pay to the plaintiffs the costs of this action for two counsel to be taxed. By consent the High Court ordered that the execution thereof be stayed pending the disposal of a formal application for stay of execution before the High Court.

[79] The order of the High Court was accompanied by a penal notice pursuant to O. 45 r. 7 of the Rules of the High Court 1980 ("RHC"). This penal notice follows the format set out in Form 87 of the RHC and it serves to warn the person served that if he neglects to obey or disobeys the judgment or order, he will be liable to process of execution for the purpose of compelling him to obey the same. And the failure to insert the penal indorsement in the order has been held to be fatal in the context of an application for committal (*Leow Seng Huat v. Low Mui Yein* [1996]

2 BLJ 466; *General (Rtd) Tan Sri Hashim Mohd Ali & Anor v. Francis s/o MG Mirandah* [2000] 4 AMR 4699 at 4703; and *Gribbles Pathology (M) Sdn Bhd v. Adventist Hospital & Clinic Services (M) Bhd (No 2)* [2003] 1 CLJ 317).

[80] Aggrieved by the decision of the High Court, the defendants filed an appeal against the whole decision of the High Court to the Court of Appeal.

[81] The whole case revolved on the sole issue of the consideration for the transfer of the "Indomie" trade mark. Yet, the trial proceeded on other issues as well and these issues were mere red herrings. At every turn and corner – indeed at every available opportunity, the defendants sought to raise every possible issue. That prompted the High Court judge to award costs for two lawyers.

Merger – *Locus Standi* Of The Plaintiffs

[82] Liquidation proceedings against the first plaintiff (P.T. Indofood Interna Corp.) and the second plaintiff (P.T. Sanmaru Food Manufacturing Co. Ltd) started on 1 March 1994. And they continued to be in liquidation under the laws of Indonesia, each under the management of a liquidator. Of significance would be this. That they are not dissolved and they continue to exist as legal entities under the laws of Indonesia.

[83] But the defendants submitted that since the first plaintiff (P.T. Indofood Interna Corp.) and the second plaintiff (P.T. Sanmaru Food Manufacturing Co. Ltd) had been dissolved and liquidated, they had no locus standi before the High Court as well as in this court. It was also emphasised that the third plaintiff (P.T. Indofood Sukses Makmur Tbk) was joined as a party to the proceedings on 20 July 2005 and that would be three months before the commencement of the trial before the High Court. The defendants questioned whether the third plaintiff was properly joined as a party on 20 July 2005. Again, it was emphasised that the third plaintiff was joined as a party only after the first and the second plaintiffs had been dissolved and liquidated according to the laws of Indonesia.

[84] To say as was said that the first plaintiff (P.T. Indofood Interna Corp.) and the second plaintiff (P.T. Sanmaru Food Manufacturing Co. Ltd) were dissolved on 1 March 1994 was wholly wrong under the laws of Indonesia. The liquidator of the first plaintiff by the name of Hadi Widjaya affirmed an affidavit on 22 May 2003 as seen in the Appeal Record Jilid IV ("ARJ IV") at pp. 1350 to 1351 and there he averred that, "The process of liquidation has not been entirely completed." A similar statement was also made by the liquidator of the second plaintiff by the name of Aufrans in his affidavit that was affirmed on 22 May 2003 as seen at pp. 1359 to 1360 of "ARJ IV".

[85] Linda Widyati, a legal practitioner in Jakarta, Indonesia affirmed an affidavit on behalf of Sanmaru Overseas Marketing Sdn Bhd (the second defendant) and Yeoh Jin Beng (the third defendant) on 4 November 2003 as seen in the Appeal Record Jilid V ("ARJ V"). There she concluded that the first plaintiff (P.T. Indofood Interna Corp.) and the second plaintiff (P.T. Sanmaru Food Manufacturing Co. Ltd) had been dissolved as of 1 March 1994 (see para 15 of her affidavit) but her conclusion was inconsistent with the plain words of the "Minutes of Meeting on Merger and Handover of Assets and Liabilities" as seen at pp. 1198 to 1215 of "ARJ IV" which simply stated that it was resolved on 1 March 1994 that the first and the second plaintiffs "has to be liquidated or dissolved" (see p. 1206 of "ARJ IV" at the top of the page). Reference should also be made to the Notice in the Gazette No: 28 dated 8 April 1994 (see p. 1236 of "ARJ IV") and the English language translation can be seen at p. 1250 of "ARJ IV" which states as follows:

> Notice is hereby given that in relation with a merger between P.T. Indofood Sukses Makmur and ... P.T. Indofood Interna Corporation ... the Resolutions for the winding-up of the companies were unanimously approved and the companies be put in liquidation with effect from the 1st of March 1994.

[86] I agree with the submissions that just like our Malaysian company law, there is a great deal of difference under the laws of Indonesia between a company that is in liquidation (and managed by a liquidator) and a company that is dissolved (not requiring any management). Here, both the first and the second plaintiffs are merely under liquidation and they are not dissolved and they are certainly entitled to sue.

[87] Under cross-examination, PWI (Cesar M. de la Cruz) testified as follows (see p. 380 of the Appeal Record Jilid II ("ARJ II")):

> OBS: I put it to you that the P1 and P2 had been liquidated under Indonesian law and were not able to maintain this action against the D5 as at 1.3.1994. Do you agree or disagree?
>
> CD: Your Lordship, I disagree. My explanation is that both Ps were still in existence and as of today, continues to be in existence.

And, under re-examination, PW1 (Cesar M. de la Cruz) confirmed that the liquidator of the first plaintiff (P.T. Indofood Interna Corp.) was Hadi Wijaya. PW1 (Cesar M. de la Cruz) was then asked the following question and he gave the answer accordingly. The notes of evidence at p. 387 of "ARJ II" carried this exchange:

> TT: He (referring to Hadi Wijaya) is the liquidator of P1 and he states that in paragraph 2 at page 9, paragraph 2 starts from page 8, the process of liquidation has not been entirely completed?
>
> CD: Your Lordship, the statement says that it was put under liquidation. Yes, the process of liquidation has not been completed.

[88] All these would categorically show that both the first and the second plaintiffs have not been dissolved and they thus have *locus standi* to pursue their claims before the High Court and in this court. They have sufficient interests in the matter to compel them to file this civil suit together with the third plaintiff. One cannot analyse the sufficiency of interest from the legal and factual basis of any given case. Lord Diplock in *Inland Revenue Commissioners v. National Federation Of Self-Employed And Small Business Ltd. (On appeal from Reg. v. Inland Revenue Commissioners, Ex parte National Federation of Self-Employed and Small Businesses Ltd.)* [1982] AC 617, at p. 644, succinctly said:

> If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief.

[89] So long as both the first and the second plaintiffs have sufficient interests in the matter that would give them standing to pursue their claims. The cases on standing decided post *Inland Revenue Commissioners v. National Federation Of Self-Employed And Small Business Ltd. [On appeal from Reg. v. Inland Revenue Commissioners, Ex parte National Federation of Self-Employed and Small Businesses Ltd.) (supra)* are more robust and forward looking. They show that the courts are willing to champion substance over procedure. Lord Diplock's judgment in *Inland Revenue Commissioners v National Federation Of Self-Employed And Small Business Ltd. (On appeal from Reg. v. Inland Revenue Commissioners, Ex parte National Federation of Self-Employed and Small Businesses Ltd.) (supra)*, at pp. 639 to 640, merits reproduction. There he said:

> The rules as to 'standing' for the purpose of applying for prerogative orders, like most of English public law, are not to be found in any statute. They were made by judges, by judges they can be changed; and so they have been over the years to meet the need to preserve the integrity of the rule of law despite changes in the social structure, methods of government and the extent to which the activities of private citizens are controlled by governmental authorities, that have been taking place continuously, sometimes slowly, sometimes swiftly, since the rules were originally propounded.

[90] Standing would be accorded to a person, at common law, if his or her own legal right is under threat. In relation to a public right, the requirement of standing should be satisfied if that person can show that he has suffered damage peculiar to himself or if he can show that he would imminently be in that position (*Boyce v. Paddington Borough Council* [1903] 1 Ch 109). Both the first and the second plaintiffs would easily qualify as claimants who would suffer damage and accordingly they must be given standing to pursue their claims.

Joinder

[91] In regard to the joinder of the third plaintiff (P.T.Indofood Sukses Makmur Tbk), I have this to say. The defendants are precluded from questioning the joinder of the third plaintiff at this point of time. The defendants filed an application seeking an order that the third plaintiff should not be added as a party to this civil suit, whether by way of substitution in place of the original plaintiffs or by way of an additional plaintiff. The defendants

pursued that application strenuously before the registrar, before the High Court and finally before another panel of this court. The defendants even went to the extent of applying for leave to appeal to the Federal Court against the decision of the other panel of this court given on 25 October 2005, just one day prior to the commencement of the trial of this suit in the High Court. It was certainly an option for the defendants not to have taken the position of applying in a separate proceeding to strike out the third plaintiff as a party to this suit. The defendants could, if they wanted to, take the objection as a defence at the trial proper. But that did not happen. Now, having pursued the objection vigorously in interlocutory proceedings right up to the Federal Court, the defendants must be precluded by *res judicata* from raising it again in this court. If the defendants are permitted to pursue the same objection in this appeal, the defendants would be given two bites at the proverbial cherry. That cannot be right. *Halsbury's Laws of England*, 4th edn, at p. 434, at para. 980 carries the following write-ups:

> Issue estoppel means that a party is precluded from contending the contrary of any precise point which, having once been distinctly put in issue, has been solemnly and with certainty determined against him. Even if the objects of the first and second claims or actions are different, the finding on a matter which came directly in issue in the first claim or action, provided it is embodied in a judicial decision that is final, is conclusive in a second claim or action between the same parties and their privies.

Continuing at p. 436 at para. 981, the learned authors of *Halsbury*'s had this to say:

> The conditions for the application of issue estoppel require a final decision on the issue by a court of competent jurisdiction and that:
>
> (1) the issue raised in both proceedings is the same; and
>
> (2) the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which estoppel is raised or their privies.

[92] *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283, [1995] 3 MLJ 331, [1995] 3 AMR 2871, a Federal Court decision, is now the leading case on estoppel and it has been cited in many cases and these cases have been reported in the local law journals: *Hong Leong Leasing Sdn Bhd v. Far East Knitting Sdn Bhd* [1996] 2 MLJ 251 at 262,

[1997] 1 CLJ 123, [1996] 2 AMR 1886; *KGN Jaya Sdn Bhd v. Pan Reliance Sdn Bhd* [1996] 2 CLJ 611; [1996] 1 MLJ 233, [1996] 1 AMR 839; *Chong Yoong Choy v. UOL Factoring Sdn Bhd* [1996] 2 CLJ 605; [1996] 1 MLJ 421, [1996] 2 AMR 1394; *Teh Poh Wah v. Seremban Securities Sdn Bhd* [1996] 1 MLJ 701, [1996] 4 CLJ 16, [1996] 1 BLJ 463; *Chor Phaik Har v. Choong Lye Hock Estates Sdn Bhd* [1996] 2 MLJ 206, [1996] 4 CLJ 141, [1996] 2 AMR 2393; *UMW Toyota (M) Sdn Bhd v. Chow Weng Thien* [1996] 5 MLJ 678, [1997] 1 AMR 728; *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 3 CLJ 305; [1997] 2 MLJ 565, [1997] 3 AMR 2458; *Raju Jayaraman Kerpaya v. Chung Khiaw Bank Ltd* [1997] 2 MLJ 590, [1997] 3 CLJ 216, [1997] 3 AMR 2420; *BSN Commercial Bank (M) Sdn Bhd v. Pentadbir Tanah Daerah, Mersing* [1997] 3 CLJ Supp 1; [1997] 5 MLJ 288; *Tan Cheng Yam v. Emperee Sdn. Bhd. & Ors.* [1997] 3 CLJ 102, [1997] 4 AMR 3194; and *Bukit Melita Sdn Bhd v. Lam Geok Hee & Ors* [1996] 1 LNS 479. Gopal Sri Ram JCA, writing for the Federal Court in *Boustead Trading (supra)* aptly said at p. 294 of the CLJ reporting:

> The time has come for the court to recognise that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless.

[93] While the Court of Appeal in *Low v. Bouverie* [1891] 3 Ch. 82 establishes the principles that estoppel cannot be used as a cause of action but merely serves as a rule of evidence, the Australian High Court in *Waltons Stores (Interstate) Ltd v. Maher and Another* [1988] 76 ALR 513 goes to the extent of allowing a plaintiff to utilise estoppel as a substantive cause of action. The Federal Court in *Boustead* makes no mention of whether estoppel can constitute a substantive cause of action notwithstanding the fact that it cited the *Waltons Stores* case in its judgment. Lord Wright, delivering the judgment of the Privy Council in *Canada and Dominion Sugar Company, Limited v. Canadian National (West Indies) Steamships, Limited* [1947] AC 46 at p. 55, succinctly said:

> There was, perhaps, a time when estoppels were described as odious and as such were viewed with suspicion and reluctance. But in modern times the law of estoppel has developed and has become recognised as a beneficial branch of law. That great

A lawyer Sir Frederick Pollock has described the doctrine of estoppel as 'a simple and wholly untechnical conception, perhaps the most powerful and flexible instrument to be found in any system of court jurisprudence'.

B **[94]** I will now call in aid O. 15 r. 6(1) of the RHC. It reads as follows:

> 6(1) No cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party; and the Court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.

C This rule is a life saver. It prevents an action from being defeated by the misjoinder or non-joinder of the parties – be it the plaintiffs or the defendants, and subject to certain principles allows for the D addition, substitution or striking out of the parties as the plaintiffs or the defendants. It also allows intervention or striking out of persons who are not parties to the action and for misnomer. It must be borne in mind that the court has a wide discretion to make the necessary order so that all the relevant parties are before E the court. In *Chan Kern Miang v. Kea Resources Pte Ltd* [1999] 1 SLR 145, the Court of Appeal refused the application of the defendant to add another party as a defendant because that party had been sued separately by the plaintiff previously and a settlement agreement had been reached in that case and the court F held that the plaintiff would be barred from claiming any reliefs from him. In *Chan Min Swee v. Melawangi Sdn Bhd* [2000] 7 CLJ 1, the court, in actions for breach of contract and misrepresentation where the plaintiff had already assigned his rights under the contract to a bank, ordered a stay of the proceedings to allow the G plaintiff to include the assignee bank as a party to the action because both the plaintiff and the bank had rights in the chose in action *via* the assignment. The court was reluctant to decide the issue in the absence of the bank because any decision on the issue would not bind the bank. The court in *Byrne and Another v.* H *Brown. Diplock, Third Party* [1889] Vol XXII QBD 657 allowed the addition of new parties even though such an addition may cause additional expense and necessitate the introduction of new evidence.

I

[95] Linda Widyati, the legal expert relied upon by the defendants, in her affidavit affirmed on 4 November 2003 categorically stated that the third plaintiff (P.T.Indofood Sukses Makmur Tbk) would have taken over all the assets, rights and obligations, including all legal actions of, *inter alia*, Indofood and Sanmaru due to the merger exercise that was conducted on 1 January 1994. In her own words this was what she deposed in her affidavit (see pp. 1543 to 1544 of "ARJ V"):

> 16. Based on the documents mentioned in paragraph 12 above, I state that Sukses would have taken over all the assets, rights and obligations including all legal actions of, *inter alia*, Indofood and Sanmaru as a result of the merger as of 1st January 1994. However, I am not able to comment on the nature of such assets, rights or obligations since a copy of the Financial Statement of 31st December 1993 referred to in, *inter alia*, Deed No: 5 dated 1.3.1994, was not attached to any of the documents mentioned above. The liquidated companies have no right or power to take any legal action or proceeding after the merger as of 1.1.1994.

[96] It was quite ironical that despite the averment of Linda Widyati as alluded to above, the defendants have persistently maintained in the High Court that there was no clear evidence what were the alleged rights, obligations, assets and liabilities of the first plaintiff (P.T. Indofood Interna Corp.) and the second plaintiff (P.T. Sanmaru Food Manufacturing Co. Ltd) which were transferred to the third plaintiff (P.T.Indofood Sukses Makmur Tbk), and that the plaintiffs did not produce the balance sheet dated 31 December 1993 or the Financial Statement dated 31 December 1993 referred to in the "Minutes of Meeting on Merger and Handover of Assets and Liabilities No: 5" as detailing the assets and liabilities transferred and that no weight should be attached to the plaintiffs' Indonesian law expert affidavit of Ignatius Andy Andria that was affirmed on 19 February 2003 as seen at pp. 1342 to 1345 of "ARJ IV". By way of a reply, I have this to say:

(a) The bulk of the corporate merger documents relied upon by the plaintiffs including those exhibited in the affidavit of Ignatius Andy Andria have been reviewed by the defendants' own Indonesian law expert Linda Widyati, whose affidavit affirmed on 4 November 2003 as seen at pp. 1543 to 1544 of "ARJ V" confirmed that the third plaintiff would have taken

over all the assets, rights and obligations, including all the legal actions of, *inter alia*, the first plaintiff and the second plaintiff as a result of the merger.

(b) PWI (Cesar M. de la Cruz) was cross-examined on the existence of the Financial Statement, which was enclosed in the trial bundle, by counsel for the defendants and he testified as follows (see p. 384 of "ARJ II"):

> Your Lordship, if you would allow me, I do not have the financial statement as of the time of merger but my recollection is that it included the usual cash accounts, receivable accounts, tangible fixed assets, liabilities both to the banks and to the third parties and the shareholders equity as of the date of the merger. I also have to state to your Lordship that intangible assets are normally not recorded in accounts of companies in Indonesia.

[97] At this juncture, it is germane to reproduce the contents of the affidavit of Ignatius Andy Andria, the legal expert of the plaintiffs as seen at pp. 1342 to 1345 of "ARJ IV". There, he deposed at paras 3 to 4 of the affidavit to the following salient facts:

> 3. I make this Affidavit in response to a request by the Plaintiffs and P.T. Indofood Sukses Makmur Tbk. to advise on the following issues under Indonesian law:
>
> (a) What are the valid documents under Indonesian law that will be sufficient evidence of the merger of P.T. Indofood Interna Corporation and P.T. Sanmaru Foods Manufacturer Company Limited into P.T. Indofood Sukses Makmur in 1994?
>
> (b) Whether the above documents will provide the evidence to transfer all rights, including all intellectual property rights and accompanying rights of action relating to the same, from P.T. Indofood Interna Corporation and P.T. Sanmaru Foods Manufacturer Company Limited to P.T. Indofood Sukses Makmur?
>
> (c) What are the valid documents under Indonesian law that will be sufficient evidence of the change of name from P.T. Indofood Sukses Makmur to P.T. Indofood Sukses Makmur Tbk.?

4. With regard to the above issues, I confirm and say as follows:

(a) The valid documents under Indonesian law at the material time in 1994 that will be sufficient evidence of the merger of P.T. Indofood Interna Corporation and P.T. Sanmaru Foods Manufacturer Company Limited into P.T. Indofood Sukses Makmur are the:

(i) Deed of P.T. Indofood Interna Corporation Minutes of Meeting No. 102 dated 12 February 1994;

(ii) Deed of Sanmaru Foods Manufacturer Company Limited Minutes of Meeting No. 107 dated 12 February 1994;

(iii) Deed of P.T. Indofood Sukses Makmur Minutes of Meeting No. 108 dated 12 February 1994;

(iv) Deed of Merger No. 109 dated 12 February 1994;

(v) Public Announcement regarding the merger on Bisnis Indonesia daily dated 13 February 1994;

(vi) Announcement in the State Gazette No. 13 dated 15 February 1994 Supplement No. 226;

(viii) Approval From Chairman of the Capital Investment Coordinating Board No. 86/III/PMDN/1994 dated 1 March 1994; and

(viii) Deed of Minutes of Meeting on Merger and Handover of Assets and Liabilities No. 5 dated 1 March 1994.

Now produced and shown to me marked as Exhibit A-1 are copies of the above documents.

(b) Article 4 of the Deed of Merger No. 109 dated 12 February 1994 states that the parties have also agreed that all rights and obligations of the merged companies including but not limited to fixed assets, movable assets, companies licenses, good will, assets-liabilities etc. as set out in the Financial Report, potential legal claims or the on-going legal claims before the courts or any other institution at any stage will be entirely transferred without limitation and will become the right and/or obligation of P.T. Indofood Sukses Makmur with obligation to accommodate, to bear or to pay all liabilities which previously borne by the merged companies. Therefore, the above documents do provide the

A evidence to transfer all rights, including all intellectual property rights and accompanying rights of action relating to the same, from P.T. Indofood Interna Corporation and P.T. Sanmaru Foods Manufacturer Company Limited to P.T. Indofood Sukses Makmur.

B (c) The abbreviation "Tbk." refers to "Terbuka" which means that the company is a public company. P.T. Indofood Sukses Makmur became a public company in 1994. In compliance with the Company Law of 1995 which came into force in 1996, P.T. Indofood Sukses Makmur, C being a public company, was required to insert the word "Tbk." and change its name to P.T. Indofood Sukses Makmur Tbk. This was carried out based on the following documents:

(i) Deed of P.T. Indofood Sukses Makmur Meeting D Resolution No. 150 dated 24 June 1997;

(ii) The Minister of Justice of the Republic of Indonesia's approval No. C2-7092.HT.01.04.TH97 dated 25 July 1997;

E (iii) Announcement in the State Gazette No. 78 Supplement No. 4480 dated 30 September 1997.

[98] Clearly, therefore, on the available evidence the third plaintiff (P.T.Indofood Sukses Makmur Tbk) was rightly joined as a party F to the civil suit.

Limitation

[99] In regard to limitation, I have this to say. The wide and broad powers of the court pursuant to O. 20 r. 5 of the RHC G read together with O. 15 r. 6 of the RHC would include the power to give leave to add a party or to amend any pleading even after the expiry of any relevant period of limitation (O. 20 r. 5(2) of the RHC) or to add a new cause of action (O. 20 r. 5(5) of the RHC). And by virtue of the doctrine of relation back, the law H treats the "new" party (here, it would be the third plaintiff) as being a party who had been a party from the date of the issue of the writ and that would be on 13 October 1993 and that would be well within any period of limitation.

I

[100] The law may be stated as follows. That an amendment will be granted, where the limitation period has expired, notwithstanding that such an amendment will add or substitute a new cause of action provided that the new cause of action has arisen from the same or substantially the same set of facts (*Hock Hua Bank Bhd v. Leong Yew Chin* [1987] 1 CLJ 126; [1987] CLJ (Rep) 126 SC). Thus, the court may allow the amendments mentioned in O. 20 r. 5(3), O. 20 r. 5(4) and O. 20 r. 5(5) of the RHC, notwithstanding that the application for an amendment is made after the expiry of any relevant period of limitation current at the date of the issue of the writ. And the best part is this. That the application may be made, even though at the date of the application, the cause of action to which the amendment is related may have become time-barred but would not have been if it had been made at the commencement of the action. And this is simply because an amendment takes effect not at the date the application for the amendment is made but at the date of the commencement of the action. This is known as the doctrine of relation back and it has been applied in many instances (*Boss s/o Ramasamy v. Penang Port Sdn Bhd & Anor* [1996] 1 LNS 26). The amendments sought must be in relation to correcting the name of the party (O. 20 r. 5(3) of the RHC) or in regard to altering the capacity in which the party sues or is sued (O. 20 r. 5(4) of the RHC) or in regard to adding or substituting a new cause of action (O. 20 r. 5(5) of the RHC).

[101] Still on limitation, reference should be made to s. 22 of the Limitation Act 1953. That section enacts as follows (the relevant parts):

22. Limitation of actions in respect of trust property

(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action:

(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or

(b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.

[102] Here, the plaintiffs are claiming to recover trust property from the defendants and by virtue of s. 22(1)(b) of the Limitation Act 1953 there is no limitation period to impede the joinder of the third plaintiff (P.T.Indofood Sukses Makmur Tbk) as a party to the proceedings (*Rajoo Selvappan & Ors v. Abdul Bhari Kader Ibrahim & Ors* [2005] 7 CLJ 326).

Assignment Of The "Indomie" Trade Mark Registered In Malaysia From The Second Defendant (Sanmaru Overseas Marketing Sdn Bhd) To The First Plaintiff (P.T. Indofood Interna Corp.)

[103] I did say in the early part of this judgment that the sole issue for determination in this appeal centred on the quantum of the consideration for the transfer of the "Indomie" trade mark. That would be the central question for determination which would adjudicate and end this appeal, one way or the other.

[104] The appropriate question to pose would be as follows: What was the agreed consideration for the assignment of the "Indomie" trade mark registration in Malaysia from the second defendant (Sanmaru Overseas Marketing Sdn Bhd) to the first plaintiff (P.T. Indofood Interna Corp.)? Was it (a) RM10 as contended by the plaintiffs or (b) US$680,000 as contended by the second defendant (Sanmaru Overseas Marketing Sdn Bhd) and the third defendant (Yeoh Jin Beng)?

Contemporaneous Documents

[105] To answer the central question of the day, an examination of the evidence is called for. The High Court found as a fact that the true consideration was RM10 and not US$680,000. The available evidence would show that the High Court was right in arriving at that conclusion. I will now examine the contemporaneous documents. The first letter to consider would be the letter dated 25 July 1990 from the first defendant (Far East Food Industries Sdn Bhd (dalam likuidasi)) to the first plaintiff (P.T. Indofood Interna Corp.) and that letter was signed by the third defendant (Yeoh Jin Beng). That letter enclosed two deeds of assignment and two Forms of Authorisation of Agent. That letter can be seen at p. 794 of the Appeal Record Jilid III ("ARJ III") and it was worded in this way:

July 25, 1990

P.T. Indofood Interna Corpn
Central Plaza, 17th Floor
Jln. Jend. Suriman kav. 47-48
Jakarta Selatan 12930
Indonesia

Attn: Mr. Hendy Rusli

Dear Sir,

Re: Trade Mark – "Indomie & Device"

Please find enclosed two Deeds of Assignment for transfer of the above Trade Mark Registration in Class 30 in Malaya, Sabah & Sarawak and in Brunei together with two authorisation forms for your signature.

Kindly attach the Common Seal on the Deed of Assignment and return all the documents for our further action.

Thank you and regards.

Yours faithfully,
Far East Food Industries Sdn Bhd

Sgd. (Illegible)
Yeoh Jin Beng

General Manager

YJB/kl.

[106] On 26 September 1990, the two deeds of assignment were executed by both parties with the third defendant (Yeoh Jin Beng) signing on behalf of the second defendant (Sanmaru Overseas Marketing Sdn Bhd). The consideration stated in the two deeds of assignment was RM10 (see pp. 795 to 798 of "ARJ III"). One deed of assignment was meant for Brunei (see pp. 795 to 796 of "ARJ III"). The other deed of assignment was meant for Malaya, Sabah and Sarawak (see pp. 797 to 798 of "ARJ III"). In this judgment, I am only concerned with the deed of assignment for Malaya, Sabah and Sarawak.

[107] The second letter to consider would be the letter from Messrs Shearn Delamore to the second defendant (Sanmaru Overseas Marketing Sdn Bhd) dated 23 October 1990 enclosing an invoice for services rendered with regard to the assignment. That letter can be seen at p. 803 of "ARJ III".

[108] The third letter to refer to would be the letter dated 12 November 1990 from the first defendant (Far East Food Industries Sdn Bhd (dalam likuidasi)) to the first plaintiff (P.T. Indofood Interna Corp.) enclosing the invoice from Messrs Shearn Delamore. The first plaintiff subsequently paid for this invoice. That letter can be seen at p. 804 of "ARJ III".

[109] The fourth letter to scrutinise would be the letter dated 29 January 1991 from the Indofood group to the first defendant (Far East Food Industries Sdn Bhd (dalam likuidasi)) to the third defendant (Yeoh Jin Beng). That letter enquired about the progress of transferring the trade mark from the second defendant (Sanmaru Overseas Marketing Sdn Bhd) to the first plaintiff (P.T. Indofood Interna Corp.) That letter can be seen at p. 805 of "ARJ III" and it was worded in this fashion:

Re: Trademark Registration

1) Please inform us the progress of transferring the trademark(s) registered under Sanmaru Overseas Mkt. to PT Indofood Interna Corp.:
   - Indomie & (Device)/Malaya M/100816.
   - Indomie & (Device)/Sabah S/32614.
   - Indomie & (Device)/Sarawak 27663.
   - Indomie & (Device)/Brunei 13330.
2) Whether the process of transferring the trademark(s) also (includes) the process of renewal (of) some of the (expired) trademark registration(s)?
3) I don't have in my custody the trademark(s) of:
   - Indomie & (Device)/Malaya M/100816.
   - Indomie & (Device)/Sabah S/32614.
   - Indomie & (Device)/Brunei 13514.

   PIease send me (the) original copies, if any, or (a) copy (of each of them).

[110] The fifth letter to consider would be the letter dated 19 August 1992 from the first defendant (Far East Food Industries Sdn Bhd (dalam likuidasi)) to the first plaintiff (P.T. Indofood Interna Corp.) That letter was signed by the third defendant

(Yeoh Jin Beng) and that letter can be seen at pp. 806 to 808 of "ARJ III". The letter enclosed the "Indomie" trade mark registration certificate meant for the first plaintiff (P.T. Indofood Interna Corp.).

[111] The sixth letter to scrutinise would be the letter dated 26 August 1992 from the Indofood group to the first defendant (Far East Food Industries Sdn Bhd (dalam likuidasi)) and to the third defendant (Yeoh Jin Beng). That letter enquired as to the status of the transfer of the "Indomie" trade mark and that letter can be seen at p. 809 of "ARJ III" and it was worded in this way:

Indofood

THE SYMBOL OF QUALITY FOODS

26/8/92

To : Mr. Yeoh Jin Beng
Far East Food Industries Sdn. Bhd.

From : Hadi Wijaya

Subject : Indomie Trademark Registration in Malaysia M/100816

Dear Yeoh,

Please advise me (as soon as possible) the status of the "Indomie" Trademark M/100816 under the name of Sanmaru Marketing Overseas which is suppose(d) to be transfer(red) to P.T. INDOFOOD INTERNA CORPORATION.

Up to date we haven't receive any documents confirming the transfer except for the Invoice of Shearn Delamore dated 23rd October 1990.

Yours truly,

Sgd. (Illegible)
Hadi Wijaya

cc: Her
- Edmund C.T.
- AL Umali.

[112] The seventh letter to consider would be the letter dated 18 September 1992 from the first defendant (Far East Food Industries Sdn Bhd (dalam likuidasi)) to the Indofood group – for the attention of Hendy Rusli. That letter can be seen at p. 810 of "ARJ III" and it was worded in this way and it made reference to the Boustead injunction:

> September 18, 1992
>
> Indofood International Division
> Central Plaza, 17th Floor
> Jln. Jend. Suriman kav. 47-48
> Jakarta Selatan 12930
> INDONESIA
>
> Attn: Mr. Hendy Rusli
>
> Dear Sir,
>
> We refer to the trademark of Indomie in Malaysia and wish to inform that Sanmaru Overseas Marketing is still the registered owner of the said trademark for Malaysia and Brunei.
>
> I believe the High Court Injunction taken by Boustead in 1991, in view of the payment dispute which has now been resolved, has prevented any transfer of the trademark.
>
> Thank you.
>
> Yours faithfully,
> Far East Food Industries Sdn Bhd
>
> Sgd. (Illegible)
>
> Yeoh Jin Beng
> Regional General Manager – ASEAN
>
> YJB/kl.

[113] The eighth letter to scrutinise would be the letter dated 16 February 1993 from the Indofood group to Messrs Shearn Delamore enquiring as to the status of the assignment of the "Indomie" trade mark. That letter can be seen at p. 811 of "ARJ III" and it was worded in this fashion:

Indofood

The Symbol Of Quality Foods

Jakarta, 16th February 1993.

To,
Messrs Shearn Delamore & Co.
P.O. Box 10138, 50704
Kuala Lumpur 2
Benteng, 50050
Kuala Lumpur – Malaysia.

Dear Sirs,

Re: Invoice No. A 70072

Please advise us accordingly the status of the assignment of "Indomie & Device" trademark from Sanmaru Mkt Sdn Bhd which was supposed to be transferred to P.T. Indofood Interna Corp. as stipulated in your invoice No. A 70072 dated 23th October 1990.

We request your direct explanation to us since we understood that all (the) assignment documentation(s)(have) already been properly executed and submitted to you accordingly.

Your prompt reply will be very much appreciated.

Yours truly,

Sgd. (Illegible)

Hadi Wijaya.

[114] The ninth letter to consider would be the letter dated 24 March 1993 from Messrs Shearn Delamore to the Indofood group. That letter can be seen at p. 812 of "ARJ III" and it was worded in this manner:

Shearn Delamore & Co

24 March 1993

Indofood Group
Central Plaza 17th. Floor
Jl. Jend. Sudirman Kav 47-48
Jakarta Selatan 12930
Indonesia

Fax No: 5701431
Dest : Indonesia
Client:Sanmaru Overseas

Attn: Mr. Hadi Wijaya

Dear Sirs,

Re: Assignment Against Trade Mark Nos. M/100816, S/32614 & 27663 TM INDOMIE & DEVICE in Class 7 in Malaya, Sabah & Sarawak

From : Sanmaru Overseas Marketing Sdn. Bhd.

To: PT Indofood Interna Corporation

I refer to your letter of 16th. February 1993.

Our records show that our instructing clients are Sanmaru Overseas Marketing Sdn. Bhd.

In the light of the solicitor-client relationship we would advise that you communicate with them on this matter. Suffice it for us to say that our records show that the pending recordal of the Assignment has been retracted.

Yours faithfully,
Sgd. (Illegible)
(Wong Sai Fong).

[115] In all these letters that were exchanged between the parties and their solicitors from 25 July 1990 to 24 March 1993, there is no reference to any agreement to show that the consideration for the assignment of the Indomie trade mark was US$680,000 as claimed by the defendants. On the contrary, the deed of assignment expressly states that the consideration is a paltry RM10. Thus far, the defendants cannot point to a single contemporaneous document to support their claim that the agreed consideration was US$680,000.

[116] The first ever reference to the sum of US$680,000 was made by the third defendant (Yeoh Jin Beng) in his affidavit affirmed on 26 October 1993 which can be seen at pp. 1516 to 1534 of the Appeal Record Jilid V ("ARJ V"). At paras 26 and 27 of his affidavit, the third defendant (Yeoh Jin Beng) deposed as follows (see pp. 1526 to 1527 of "ARJ V"):

26. With regard to paragraphs 8, 9, 10, 11 and 12 of Hendy's Affidavit, it is true that the 2nd Defendant has agreed to sell the trade mark "Indomie" to the 1st Plaintiff but the Plaintiffs have failed to inform this Honourable Court the true position and the reason why the transfer was withdrawn. It was the 1st Plaintiff

(who) was in breach of contract in failing to pay the 2nd Defendant a sum of US$680,000.00 as the agreed consideration for the transfer of the trade mark "Indomie". The document now produced and shown to me and marked as "YJB6" is a true copy of a letter dated 25.7.1990 from the 2nd Defendant to the 1st Plaintiff.

27. I state that the 1st Plaintiff has failed to pay the said sum of US$680,000.00 to the 2nd Defendant despite the assurance of the 1st Plaintiff that it would be paid as agreed. I have personally reminded Hendy Rusli for the said payment and he assured me that it would be paid before the assignment of the trade mark was finalised. The reason why the 2nd Defendant did not insist on payment of the said sum of US$680,000.00 before the assignment was signed by the 2nd Defendant was due to the fact that the parties were then in cordial and harmonious relationship and all dealings and transactions were conducted between the parties on a mutual trust basis. The Defendants therefore take objection that the Plaintiffs have not disclosed this important and material fact in their Affidavit filed in support of the Ex parte Summons-In-Chambers dated 13.10.1993.

[117] This affidavit that was affirmed by the third defendant (Yeoh Jin Beng) on 26 October 1993 was used in the interlocutory injunction proceedings after the writ in this civil suit was issued on 13 October 1993. In that affidavit, the third defendant (Yeoh Jin Beng) exhibited a letter bearing the date 25 July 1990 which he claimed that he had sent it to Hendy Rusli. The letter dated 25 July 1990 formed the plank of the defendants case and it will now be referred to affectionately as the "side letter". The side letter alluded to the alleged agreement between the third defendant (Yeoh Jin Beng) and Hendy Rusli wherein the latter had purportedly proposed "to buy over the Indomie trade mark and device for a total consideration of US$680,000". It would be ideal to reproduce that side letter which can be found at p. 813 of "ARJ III" and it was worded in this way:

Sanmaru Overseas Marketing Sdn. Bhd.

25th July, 1990

Mr. Hendy Rusli
P.T. Indofood Interna Corpn.
Jakarta Indonesia

Private And Confidential

Dear Sir

Re: Assignment of Trade Marks

I refer to my letter and enclosures to you in respect of the Assignment of Indomie trade mark and device of today and also to our discussion in Jakarta of June 11.

I have discussed and persuaded the shareholders of (Sanmaru Overseas Marketing) to agree to your proposal to buy over the Indomie trade mark and device for a total consideration of US$680,000.00 (United States Dollars Six Hundred and Eighty Thousand Only).

The shareholders of (Sanmaru Overseas Marketing) agreed on the basis of our continuing good relationship to promote the brand jointly.

Please arrange to let me have the Bank Draft of US$680,000.00 (United States Dollars Six Hundred and Eighty Thousand Only) in favour of Sanmaru Overseas Marketing Sdn. Bhd. in settlement of the abovementioned together with the signed Assignment documents.

As soon as I received same, I shall arrange for our Solicitors to file accordingly.

Regards,

Yours faithfully
Sgd. (Illegible)
Yeoh Jin Beng

c.c. Izzap. Ltd
c/o Singapore.

[118] The side letter which was dated 25 July 1990 was kept out of sight by the third defendant (Yeoh Jin Beng) and it only surfaced as an exhibit on 26 October 1993 when the third defendant affirmed an affidavit that was used in the interlocutory injunction proceedings. Calculation wise the side letter surfaced some three years three months one day later (26 October 1993 minus 25 July 1990).

[119] Hendy Rusli quickly responded by affirming an affidavit in reply on 9 November 1993 which was used in the interlocutory injunction proceedings. In his affidavit, Hendy Rusli categorically and expressly denied receiving the side letter and, by implication, he too denied such an agreement to buy over Indomie trade mark for US$680,000. Hendy Rusli's affidavit in reply can be seen at pp. 814 to 820 of "ARJ III" and at p. 817 thereof he deposed to the following salient facts:

> (a) If the trade mark "Indomie" was not assigned as part of the agreement reached in Indonesia, between the Jangkar Jati Group and the Salim Group, why was the Deeds of Assignment executed and the monetary consideration was stated to be $10.00 ringgit instead of US$680,000.00 as alleged. The exhibit YJB 6 is a document which I never received, and I assume to be a document created as an afterthought. I deny receiving such a letter for the simple reason no such letter was sent to me. Even if the same was alleged to have been sent to me it could not have reached me as there was no proper address in the said letter.
>
> (b) If the non-payment of the alleged US$680,000.00 was the real reason for the non-transfer of the trade mark "Indomie", then why did the deponent state in the exhibit marked HR-7 attached to Annexure D of my earlier affidavit that it was the Boustead injunction which was the cause for the delay in the transfer. If the non-payment of the alleged sum is true, (then) the non-transfer would have been communicated earlier to the 1st Plaintiff. Despite written queries about the transfer at the material time, no such absurd reason was communicated to the 1st Plaintiff. I am advised and verily believe that the exhibit YJB-6 is a concocted document. In any event its cogency is suspect.
>
> (c) It is clearly stated that Messrs Shearn Delamore was appointed as the trade mark agents of the 1st Plaintiff. See exhibit HR-2(e) attached to Annexure B of my earlier affidavit.

What Was The Position Of The Third Defendant (Yeoh Jin Beng) In The Indofood Group In The Early 1990's?

[120] At the outset, it is necessary to consider the position of the third defendant (Yeoh Jin Beng) in the Indofood group in the early 1990's when determining the credibility of his claim that he had reached an oral agreement during that period of time with Hendy Rusli – one of his superior officers in the Indofood group in regard to the payment of US$680,000. PWI (Cesar M. de la Cruz) in his witness statement at para 53 of pp. 1552 to 1584 of

A "ARJ V" made reference to the degree and scale of integration and close managerial control exercised by Jakarta over the day to day operations of its Malaysian subsidiaries, namely, the first defendant (Far East Food Industries Sdn Bhd (dalam likuidasi)) and the second defendant (Sanmaru Overseas Marketing Sdn B Bhd). Such control reflects the commercial reality of the day and it is often the way in which multinational companies with headquarters outside Malaysia direct and manage the operations of their Malaysian subsidiaries. Approximately thirty (30) documents were referred to in PWI's witness statement at para 53 and C these documents can be seen at pp. 680 to 767 of "ARJ II". The degree of control by Jakarta over the three defendants (Far East Food Industries Sdn Bhd (dalam likuidasi), Sanmaru Overseas Marketing Sdn Bhd and Yeoh Jin Beng) are reflected in these thirty (30) documents. Suffice for this exercise that I refer to only D three pertinent documents. The first document would be an internal memorandum at p. 693 of "ARJ II" and it was worded in this way:

Internal Memorandum

E

To	: Mr Yeoh Jin Beng	Date	: August 10,1990
From	: A.L. Umali	Ref.	: FS-02/90-210
Subject	: Car Replacement		

I am pleased to inform you that our Managing Director has F agreed to your proposal to replace your existing company car with a VOLVO 740.

Thank you for your attention.

Signed (Illegible)
G A.L. Umali.

[121] The second document was a document from the second defendant (Sanmaru Overseas Marketing Sdn Bhd) addressed to the first plaintiff (P.T. Indofood Interna Corp.) dated 24 June 1991 and that can be seen at p. 741 of "ARJ II". That document H was worded in this way:

I

Sanmaru Overseas Marketing Sdn. Bhd.

Our Ref: GM/255/91

June 24, 1991

P.T. Indofood Interna Corpn
Central Plaza, 17th Floor
Jln. Jend. Sudirman kav. 47-48
Jakarta Selatan 12930
Indonesia

Attn : Mr. Hendy Rusli

Dear Sir,

Re: Request For Change Of Director

As you know that Far East Food will be manufacturing noodles in Sibu and will be selling the product to Sanmaru Overseas Marketing for further distribution in East Malaysia.

However, due to sales tax purposes, it will not be proper for my name to appear in both Far East Food and Sanmaru Overseas Marketing. As such, I am writing to you to seek your approval to appoint another name to replace me in Sanmaru.

I am proposing to use the name of Liew Yoke Fatt.

Kindly revert and advise.

Regards,

Yours faithfully,
Sanmaru Overseas Marketing Sdn Bhd

Sgd. (Illegible)
Yeoh Jin Beng
General Manager

YJB/kl.

[122] The third document would be a letter addressed to the third defendant (Yeoh Jin Beng) from Indofood group and it was worded in this fashion (see p. 743 of "ARJ II"):

Indofood
The Symbol Of Quality Foods

Jakarta, June 1992

Confidential

To: Mr. Yeoh Jin Beng

Dear Mr. Yeoh Jin Beng,

We are pleased to inform you that effective 1st April 1992 your Monthly Basic Salary will be M$9,830.

On behalf of the company we also would like to express our appreciation for the effort you have extended this past year, and hope next year will be even better for you.

Yours Sincerely,

Sgd. (Illegible)	Sgd. (Illegible)
Herman S. Endro	Edmun C. Tate
Personnel Director	IOD Director.

[123] At the material time when the third defendant (Yeoh Jin Beng) claims that he had reached an oral agreement with Hendy Rusli, the third defendant's freedom to manage matters in Malaysia was so limited and constrained to such an extent that he had to seek Jakarta's permission even for such mundane and routine matters like purchasing a company car and having his salary fixed by Jakarta. In short, the third defendant's powers were shackled and circumscribed. In these circumstances, it defies belief that the third defendant (Yeoh Jin Beng) can seriously contend that he was negotiating at arms length and had reached an agreement with a superior officer in the corporate hierarchy by the name of Hendy Rusli, which agreement required the Indofood group to pay US$680,000 to the third defendant (Yeoh Jin Beng) – a mere middle-ranking employee in the group to purchase Indofood's own trade mark.

Testimony Of Witnesses

[124] The next step to take would be to test the testimony of the witnesses with the contemporaneous documents. The relevant testimony pertaining to the agreed consideration for the assignment of the "Indomie" trade mark registration in Malaysia from the second defendant (Sanmaru Overseas Marketing Sdn Bhd) to the first plaintiff (P.T. Indofood Interna Corp.) were given

by PWI (Cesar M. de la Cruz) – on behalf of the plaintiffs, and DWI (Yeoh Jin Beng) – on behalf of the defendants. It is appropriate to reproduce their relevant evidence.

[125] Under cross-examination, the evidence of PWI (Cesar M. de la Cruz) went like this (see p. 385 of "ARJ II"):

> OBS: Do you agree with me that this letter carries the date 25.7.1990?
>
> CD: Your Lordship, that is what it appears too but I have to state that in my capacity at that time, we never saw this letter.

[126] Continuing at the same page and spilling over to p. 386 of "ARJ II", PWI (Cesar M. de la Cruz) testified under cross-examination:

> OBS: I put it to you, Mr CD that the letter referred to at paragraph 1 of page 389 of Bundle C is the letter at page 370 of Bundle C.
>
> CD: Your Lordship, again at face value, this is what letter 389 is purporting to say. However, I want to emphasise that at the time the letter was supposed to have sent, we have never received this letter because even the address in the letter does not fully state the address of PT Indofood Interna and only refers to Jakarta, Indonesia.
>
> OBS: I put it to you Mr CD that the letter at page 389 of Bundle C was sent together with the letter at page 370 of Bundle C.
>
> CD: Your Lordship, having not seen the letter at that time, I would disagree.

[127] Under re-examination, PWI (Cesar M. de la Cruz) testified in the following manner (see p. 388 of "ARJ II"):

> TT: This letter, C389, makes reference to payment of US$680,000. My question for you is, did Mr HR bring this subject up to the management committee?
>
> CD: Your Lordship, I do not recall having heard this subject from Mr HR at that time.
>
> TT: Or from any other person in the management committee.
>
> CD: Yes.

TT: Did any other person in the management committee bring up this subject of payment of US$680,000?

CD: Your Lordship, no.

[128] Still under cross-examination, PWI (Cesar M. de la Cruz) had this to say (see p. 417 of "ARJ II"):

MS: My Lord, still on paragraph 81. I put it to you that you cannot say for certain that HR and the D3 did not reach an agreement on the payment of US$680,000 referred to in the letter dated 25.7.1990?

J: And where is that document?

MS: It is referred to ... I (am), sorry my Lord ... it's 379. I apologise my Lord. It is C389.

CD: Your Lordship, first of all, it is the Ps' position that that particular letter has never been received by any of the Ps. Secondly my Lord, HR, in his capacity as Managing Director did not have the authority to agree to such amount and would have presented that to the shareholders of Indofood Interna through the MC of which I was a member at that time.

J: Did not have the capacity to agree to that amount and would have?

C: Submitted a proposal to the P1 through the management committee of which I was a member at that time and I do not recollect any discussion with Mr Rusli to this effect at the time the letter was purportedly sent or even when the letter was presented at the time the claim was filed. I believe in 1993.

[129] I will now allude to the evidence of DWI (Yeoh Jin Beng). He had this to say under cross-examination at pp. 428 to 429 of "ARJ II":

TT: Could you please explain to his Lordship why the figure US$680,000 was not set out in the DOA at page C1? So you have to go back to C1. At the bottom of C1, I will read it ... sum of $10 only, $ one assumes to be Ringgit Malaysia. Can you tell his Lordship why it does not state US$680,000.00?

D3: The DOA is a formality and we just put a nominal sum which is I must say quite a common practice and if you refer to some of the documents that the P1 produced, their assignment was also of a nominal sum, something like 10,000 rupiah. It is always in the commercial sense the actual amount is actually mentioned in separate letters or separate meetings.

TT: So Mr. Yeoh you are saying that page 1 does not state the truth? A

D3: Yes. It does not state the specific amount that was agreed upon, my Lord.

TT: Therefore it tells a lie. So it is a false statement? You accept that. It is a false statement. B

D3: It did not specify the right amount of agreed sum.

TT: In paragraph 20 of your WS you explained that by saying the amount was not stated and is for tax reasons. Could you explain to his Lordship what is your understanding of the 2 words "tax reasons"? C

D3: For tax reasons, I was given to understand that you know, if you make earn some … some sales, then you'll have to pay taxes on it like stamp duties and income tax or property gain tax, things like that. D

TT: Let us take your answer one by one. Stamp duty. I am told that a DOA of this nature does not attract stamp duty of value. It is a nominal stamp duty. And therefore it is not to save stamp duty that the figure of US$680,000 was not put in. E

D3: It is. At that point of time, we were advised that besides stamp duty, there are also other relevant taxes which I, being not an accountant I would not understand what these taxes are for so we take it that in order to avoid other taxes and complications, let's put it aside in a separate letter. F

TT: Who advised you on the stamp duty point?

D3: Our tax people, our tax … what you call, advisors.

TT: Who were they? G

D3: I have no recollection now who exactly they were but it was a kind of err advice given to me, my Lord.

TT: Messrs Shearn Delamore ("SD") prepared this DOA and helped in the entire transfer of assignment issue. Is that not correct? H

D3: Yes my Lord.

TT: Would you confirm that this document, C1 & 2, was prepared by SD? I

D3: Yes.

TT: Now we come to tax. When you talk about income tax, are you looking at it from your personal standpoint or are you looking at it from the perspective of D1 or D2? Is it D1, D2 or D3's tax that we should be concerned about? And before you answer the question, the US$680,000 if what you say is correct, is going to be paid by the Indofood Group to the vendor, comes from Indonesia. Is it the income tax repercussion for D1, D2 or D3? Tax reasons for whom?

D3: D2.

TT: So, are you telling his Lordship that the page 1 did not state the true figure US$680,000 so that the D2 does not have to disclose this receipt to the authorities?

D3: Yes, my Lord.

TT: Mr. Yeoh, do you know that that is a serious statement and there are serious implications and consequences?

D3: I believe so, my Lord.

[130] Continuing at pp. 432 to 434 of "ARJ II", DWI (Yeoh Jin Beng) testified as follows:

TT: Mr. Yeoh, can you tell his Lordship why, although the Ds, D1 and D2, wrote many letters to the Ps in the 2 and a half years since July 1990, when the so-called agreement of C389 took place. My question is why in the 21/2 years when there were so many letters written by the Ds to the Ps, there was not a single reference by the Ds to the agreement of US$680,000?

D3: Although there were no other letters written because this is a private & confidential arrangement, communications were established, my Lord. Err.. communications were established. We talked about it. Because this is a private and confidential matter. If you look at it. It is a P&C matter so we did communicate quite often. We met in Singapore or in Jakarta or when HR was err … came down to Malaysia. There were a number of times when we met, the matter was raised.

TT: When you use the terms "private and confidential", what do they mean? Private and confidential between who and whom?

D3: Between myself, the D3, for the shareholders of the D2, and with Mr HR for the Plaintiff Group, my Lord.

TT: But you've already told his Lordship that the US$680,000 was not to be paid by HR personally from his own money but from monies coming from the Indofood Group. That was what you said about ½ hour ago.

D3: Yes. Because Mr HR I understand represents the Plaintiff Group. I represent the D2. So we have got a lot of talks going on.

TT: So if you accept that Mr Rusli was acting on behalf of the Indofood Group and you accept that Indofood Group money was going to be used, what was the difficulty in stating it in a letter like C386? Please go back to C386. This is the Boustead injunction. What was the difficulty? You have accepted that HR acted on behalf of Indofood Group and Indofood money was going to be used to fund the payment of the US$680,000 ... what was wrong in saying "by the way where is my US$680,000?".

D3: Because both parties, Mr HR and myself representing our respective shareholders, want this matter to be private and confidential. That is the reason why there were no further letters written. We want it to be a private and confidential matter for reasons better known ... in *Sanmaru*'s case I have mentioned ... for reasons better known to them.

TT: You are aware that when HR affirmed that affidavit, he denied this agreement. Shall I show that to you?

D3: Yes.

TT: I will show that to you ... [inaudible] ... 390. It starts at 390 and the relevant paragraph is at C393. For the record this affidavit was affirmed on 9.11.1993 ... and it is paragraph 6A C393, if I can read it "The exhibit YB-6 is a document which I have never received ... I deny receiving such a letter ...". Could you explain to his Lordship when HR has an opportunity of seeing this letter, his response is to say I have never received this letter, C389 and there is no such agreement. What is your response to that?

D3: I believe he is lying.

[131] Further down at p. 434 of "ARJ II", DWI (Yeoh Jin Beng) had this to say:

TT: Well, Mr Yeoh, I put it to you that there was no such agreement between you and Mr Rusli for the Indofood Group to pay US$680,000 as consideration for the execution of the DOA. I put that to you.

D3: I don't agree, my Lord.

[132] The second witness called by the plaintiffs was Pandi Kusuma (PW2). He was a founding member of the first plaintiff (P.T. Indofood Interna Corp.) and the third plaintiff (P.T. Indofood Sukses Makmur Tbk). He is also the brother-in-law of Djajadi Djaja, the founder of the Jangkar Jati group and the inventor of the "Indomie" trade mark. Pandi Kusuma (PW2) represented the Jangkar Jati group in the joint venture. In his witness statement at pp 1585 to 1588 of "ARJ V", particularly at paras 7(1) to 7(9), Pandi Kusuma (PW2) gave detailed outline of the evidence pertaining to the circumstances of the joint venture from the Jangkar Jati perspective. Essentially, this was what he testified:

(a) that the joint venture between the Jangkar Jati group and the Salim group took place in 1984;

(b) that as part of the joint venture exercise, all trade marks including Indomie previously registered in favour of Djajadi Djaja, the second defendant (Sanmaru Overseas Marketing Sdn Bhd) and all the other companies in the Jangkar Jati group and the Salim group, whether in Indonesia or elsewhere, were transferred to the first plaintiff (P.T. Indofood Interna Corp.); and

(c) that pursuant to the joint venture agreement between 1986 and 1991, various trade marks registered in the name of Djajadi Djaja, P.T. Sarimi, and other members of the Jangkar Jati group including the most important trade mark in Indonesia, that is, the Indomie trade mark, were transferred in favour of the first plaintiff (P.T. Indofood Interna Corp.) for a nominal consideration.

[133] In short, everything was transferred to the first plaintiff (P.T. Indofood Interna Corp.) for a nominal consideration.

[134] It must be borne in mind that Pandi Kusuma (PW2) was hardly tested in cross-examination on his entire witness statement.The defendants too did not call any evidence to rebut Pandi Kusuma's testimony nor did they adduce any evidence of their own to contradict him. Pandi Kusuma's testimony was certainly crucial. It demonstrated that the Indomie trade mark registered in Malaysia from the second defendant (Sanmaru

Overseas Marketing Sdn Bhd) to the first plaintiff (P.T. Indofood Interna Corp.) cannot be seen as an isolated agreement or transaction. In fact, it formed part of a complex joint venture agreement between two of Indonesia's largest corporate groups. Just as the consideration for the Indonesian assignment was nominal – a mere 10,000 rupiah, so too was the consideration for the Malaysian assignment. In such circumstances, logic and commercial sense dictate that the consideration would be nominal.

[135] Evidence must certainly be scrutinised against the background of the other facts or circumstances in the case in order to determine its reliability. Challenging each other's evidence is the best method to determine reliability so that weaknesses of the opponent's case may be exposed. Cross-examination is the best method to expose the examination-in-chief of a witness, be it by way of an oral examination in court or by way of an affidavit or by way of a contemporaneous document. To discover the truth is to embark on cross-examination. Here, as I said, Pandi Kusuma (PW2) was hardly cross-examined on his entire witness statement.

The Alleged Agreement To Acquire The Indomie Trade Mark For US$680,000

[136] Out of deference to the learned counsel for the defendants, I must consider this issue. The defendants advanced the following reasons to support their contentions that the side letter dated 25 July 1990 as seen at p. 813 of "ARJ III" was delivered with the covering letter dated 25 July 1990 as seen at p. 794 of "ARJ III" and that the side letter reflected the second defendant's (Sanmaru Overseas Marketing Sdn Bhd's) acceptance of the proposal from the first plaintiff (P.T. Indofood Interna Corp.) to acquire the "Indomie" trade mark for a consideration of US$680,000. In listing down the reasons, I will also allude to the arguments advanced by both the parties.

[137] The first reason concerned the argument by the defendants that the authenticity of the side letter was not challenged by the plaintiffs. The plaintiffs argued that they have always challenged the authenticity of the side letter from the time of its appearance as an exhibit in the defendants' affidavit that was affirmed on 26 October 1993 and filed to oppose the plaintiffs' application for an injunctive relief. The plaintiffs contended that the side letter did not exist at the material time and was concocted by the

defendants for purposes of the proceedings. The plaintiffs elaborated further by referring to the evidence of PWI (Cesar M. de la Cruz) to the following effect:

(a) PWI (Cesar M. de la Cruz) testified that in his capacity as a member of the management committee in the Salim group overseeing its investment in the food division, he never saw the side letter at that time (see pp 378 and 417 of the notes of evidence at "ARJ II").

(b) PWI (Cesar M. de la Cruz) then referred to the sworn affidavit of Hendy Rusli where at paras 6(a) and 6(b) of p. 817 of "ARJ III" Hendy Rusli categorically stated that "exh. YJB6 (the side letter) is a document which I never received, and I assume to be a document created as an afterthought. … I am advised and verily believe that the exh. YJB6 (the side letter) is a concocted document."

[138] The second reason centred on the argument by the defendants that Hendy Rusli's denial was inadmissible on the ground of hearsay. By way of a rebuttal, the plaintiffs argued that the authenticity of Hendy Rusli's affidavit in reply affirmed on 9 November 1993 as seen at pp. 814 to 819 of "ARJ III" was not challenged by the defendants at the trial and the affidavit in question was admitted as part and parcel of the body of evidence during the trial proper. To resolve this impasse, reference should be made to the case of *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor* [1997] 4 CLJ 509, a decision of the then Supreme Court. There, the late Peh Swee Chin FCJ laid down the following salient principles (see pp. 521 to 522 of the report):

> In the absence of any express conditions regarding the inclusion of any of the documents in the agreed bundle of documents, speaking for myself, I have always taken the agreed bundle in a civil case to mean as follows without meeting any contradiction or any serious contradiction from any member of the Bar or any appellate court in my decades at the Bar or on the Bench.
>
> First and foremost, the agreed bundle of documents means that the documents therein are authentic and they do exist, therefore they require no proof of their authenticity by calling, eg their makers.

Secondly, the truth of contents of any of the documents in the agreed bundle of documents is always not admitted unless the contrary is indicated directly or indirectly and such truth of such contents is liable to be challenged in court at the instance of either of the parties.

Thirdly, such documents therein do not form automatically a part of the evidence of the case in question *ipso facto*, but any of such documents does become part of such evidence if it is read or referred to by either of the parties, wholly or partly, at length or in a briefest of mention, either in examination of any witness, in submission at any stage or even on any unilateral drawing of court's attention to it by either of the parties at any time before the conclusion of the case.

Fourthly, at the end of the whole case, the truth of the contents of any of the document is up to the court to determine, regard being had, *inter alia*, to any absence of challenge by either of the parties on any part of the document and similarly, the question of weight, eg either great or no weight to be given to any part of any document is also a matter for the trial court, which considers the documents including any 'written hearsay' contained therein. The court may refuse to give any weight at all to any document, but then it is accountable like in other matters, to the parties and to the appellate court for reasons for such refusal.

I find support for my views or some of my views in a learned article under the title of 'The Bundle of Discord' written by Mr Lim Kean Chye a very senior member of the Malaysian Bar, published in 'Insaf', its September issue 1988; also Mahadev Shankar J's (now JCA) judgment in *Chong Khee Sang v. Pang Ah Chee* [1984] MLJ 337; both Federal Court cases of *Henry Trading v. Harun* [1962] 2 MLJ 281 and *Borneo Co v. Penang Port Commission* [1975] 2 MLJ 204; Practice Note 1/48; Practice Note No 2/77 and s. 58 of the Evidence Act 1950.

[139] Hendy Rusli's affidavit in reply at pp. 814 to 819 of "ARJ III" was referred to by the plaintiffs during the cross-examination of DWI (Yeoh Jin Beng). Applying the speech of Peh Swee Chin FCJ in Jaafar bin Shaari, Hendy Rusli's affidavit in reply was already part of the admitted body of evidence and, consequently, the argument that the statements of Hendy Rusli as contained in his affidavit in reply was inadmissible on the ground of hearsay was certainly misconceived.

[140] The third reason advanced by the defendants was the failure on the part of the plaintiffs for not calling Hendy Rusli as a witness and the adverse inference to be drawn from it. It must be recalled that PWI (Cesar M. de la Cruz) explained as to why Hendy Rusli was not called as a witness at the trial. According to PWI (Cesar M. de la Cruz), Hendy Rusli had left the employment of the plaintiffs in 1995 and resided in Jakarta. PWI (Cesar M. de la Cruz) testified that sometime in May 2005, Anthony Salim requested Hendy Rusli to attend the trial but Hendy Rusli responded that he was not able to be present in Malaysia (see the notes of evidence at pp. 376 to 377 of "ARJ III"). This explanation was not challenged by the defendants and it must, accordingly, be accepted as a good reason for not raising the adverse inference under s. 114(g) of the Evidence Act 1950. Chang Min Tat FJ adopted the same approach in *Murugan v. Lew Chu Cheong* [1980] 1 LNS 49 and there his Lordship aptly said:

> Lastly, I was asked to draw an adverse inference under section 114(g) Evidence Act, 1950 against the motorist from the failure to call his travel companion as his witness. His explanation was that he did not know her address. This explanation was unchallenged and must therefore be accepted as sufficient to prevent the raising of the inference.

[141] The plaintiffs did not withhold or suppress evidence and there was no evidence to that effect either. The scope of s. 114(g) of the Evidence Act 1950 has been explained by Mohamed Azmi SCJ in *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC and this was what his Lordship said:

> It is essential to appreciate the scope of section 114(g) lest it be carried too far outside its limit. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but material document by a party in his possession, or for non-production of not just any witness but an important and material witness to the case.

[142] And since the sworn statements of Hendy Rusli have been admitted as evidence before the court, it cannot be presumed that Hendy Rusli, if called, would give unfavourable evidence to the plaintiffs. In regard to presumptions of fact and law, Ong J had this to say in *Mohamed Ali v. Public Prosecutor* [1962] 28 MLJ 230, 231 to 232:

In drawing presumptions under section 114 of the Evidence Ordinance, 1950, it is to be observed that what the section says is that the existence of certain facts may be presumed which the court 'thinks likely to have happened' in the circumstances of the particular case. Presumptions of fact must not be drawn automatically, or, as it were, by rule of thumb, without first considering whether in the circumstances of each particular case there were adequate grounds to justify any presumption being raised. Even, with regard to presumptions of law, Devlin LJ said recently in *Berry v. British Transport Commission* [1961] 3 WLR 450, 463:

> ... Presumptions of law ought to be used only where their use is strictly necessary for the ends of justice. They are inherently undesirable – in the sense that 'estoppels are odious', and the 'doctrine should never be applied without a necessity for it'; per Bramwell LJ *Baxendale v. Bennett* [1878] 3 QBD 525, 529, CA – because they prevent the court from ascertaining the truth, which should be the prime object of a judicial investigation, and because if they are allowed to multiply to excess, the law will become divorced from reality and will live among fantasies of its own'.

[143] It must be borne in mind that PWI's (Cesar M. de la Cruz's) testimony in regard to the non-receipt of the side letter and the alleged consideration of US$680,000 were not based solely on the statements made by Hendy Rusli. PWI (Cesar M. de la Cruz) himself has testified as to his own capacity to testify on matters pertaining to the assignment of the "Indomie" trade mark in Malaysia without making any reference to the alleged side letter as well as to the alleged consideration of US$680,000.

[144] Be that as it may, the High Court judge had considered the issue of whether an adverse inference should be drawn and he held that the findings of the court in relation to the existence or non-existence of the side letter were not based upon the affidavit of Hendy Rusli (see the grounds of judgment at pp. 1631 to 1632 of "ARJ VI"). The High Court judge did not err in concluding that the defendants had failed to prove the existence of the alleged side letter in order to establish its defence.

[145] Illustration (g) of s. 114 of the Evidence Act 1950 is quite wide in its scope. It applies to civil as well as to criminal cases. This illustration has been held to operate when a witness is not called (*Chua Kim Suan v. Ang Mek Chong* [1988] 3 MLJ 231; *Eastern & Oriental Hotel (1951) Sdn Bhd v. Ellarious George*

Fernandez & Anor [1988] 1 LNS 161; *Guthrie Sdn Bhd v. Trans-Malaysian Leasing Corp Bhd* [1991] 1 CLJ 9; [1991] 1 CLJ (Rep) 155 SC; *Abdullah Zawawi Omar v. PP* [1985] 2 CLJ 2; [1985] CLJ (Rep) 19 SC; *Public Prosecutor v. Chew Yoo Choi* [1989] 1 LNS 158; and *Jazuli Mohsin v. PP* [1990] 1 CLJ 915; [1990] 2 CLJ (Rep) 165 HC). The illustration may also apply when a document or other material evidence has not been produced (*PP v. Abd Razak Johari* [1990] 2 CLJ 1010; [1990] 2 CLJ (Rep) 672 HC). Again, the illustration may apply in a situation when a person is proved to have destroyed evidence (see p. 2701 of Woodroffe and Amir Ali *Law of Evidence,* 14th edn).

[146] Of significance is this. That the presumption can only be activated under illustration (g) if the evidence could have been produced. Thus, it is not appropriate to draw the inference if the absence of the witness can be explained to the court's satisfaction as when, for instance, he cannot be found (see *Murugan v. Lew Chu Cheong (supra)* where the party's explanation that he did not know the address of the witness was accepted; and see also *Munusamy v. Public Prosecutor (supra)*) or is out of jurisdiction just like our case at hand.

[147] The fourth reason was the argument by the defendants that the sum of US$680,000 was "private and confidential" in order to avoid tax. The plaintiffs argued in rebuttal by stating that it was improbable that the plaintiffs would diligently and conscientiously enquire over two and a half years about the status of the recordal of the deed of assignment and make no reference to the side letter even if the matter was "private and confidential" and to confound the matter further the plaintiffs were not even aware of the non-payment of US$680,000.

[148] To defraud the revenue would amount and is a clear infringement of public policy. The Court of Appeal in *Lim Yoke Kian & Anor v. Castle Development Sdn Bhd* [2000] 4 CLJ 369 considered the Supreme Court's case of *Lim Kar Bee v. Duofortis Properties (M) Sdn Bhd* [1992] 3 CLJ 1667; [1992] 1 CLJ (Rep) 173 SC which concerned a scheme devised by a tax consultant to avoid payment of estate duty and Abdul Malek Ahmad FCJ (as he then was and later the President of the Court of Appeal) made the following observations after alluding to the decision of the Supreme Court (see p. 374 of the report):

> It was held by the Supreme Court that when the contract is not *ex facie* illegal, the court can still take judicial notice of illegality and refuse to enforce the contract even though illegality has not been pleaded but only in the situation when facts which have not been pleaded emerge in evidence in the course of the trial showing clearly the illegality. They also held that the real test to be applied in any given transaction seems to be whether the primary purpose of the transaction is to avoid tax; if it is, it is an illegal purpose, that is, of such a nature that, if permitted, it would defeat the tax law in question, coming under s. 24(b) of the Contracts Act 1950. Since, from the facts, the primary purpose of the scheme in that case was to avoid paying estate duty, especially bearing in mind that the said land would practically remain with members of the immediate family of the appellant/landowner in the sense that the children and the wife of the appellant/landowner would control exclusively the holding company without their having paid one cent towards the purchase price of the said land, the Supreme Court was of the view that the scheme was therefore illegal and the agreement of sales and purchase of the said land and the subsequent trust deed were therefore unenforceable.

[149] In *Lim Yoke Kian & Anor v. Castle Development Sdn Bhd (supra)*, the court was asked by the respondent to make a finding in its favour which would condone an illegality. Factually speaking, in that case the petitioners sought a court order to wind up the first respondent which the first respondent resisted on the advice of their tax consultant in order to minimise the payment of income tax. This was what the Court of Appeal said through Abdul Malek Ahmad FCJ (as he then was and later the President of the Court of Appeal) at p. 374 of the report:

> It cannot be disputed that it was the intention of the shareholders to defer the winding up to minimise the payment of income tax, and this clearly is an illegality, not realising that as the tax would be determined at the date of disposal, it really would not have made any difference as to when the winding up takes place.
>
> Having considered the arguments and the authorities, we were of the unanimous view that the learned trial judge was in error when he refused to order the winding up. Accordingly, we allowed the appeal with costs here and below, refunded the deposit to the appellant and granted the order in terms of the winding up petition.

[150] Here, it was the third defendant's (Yeoh Jin Beng's) unequivocal admission that the alleged oral agreement between himself and Hendy Rusli was intended to conceal the consideration of US$680,000 (which was denied by the plaintiffs) in order for

A the second defendant (Sanmaru Overseas Marketing Sdn Bhd) to avoid disclosing receipt of these monies to the authorities. Simply put, it was to defraud the revenue. In the face of such an admission by the third defendant (Yeoh Jin Beng), this court cannot uphold such a defence as it would be countenancing the B illegal act of the second defendant (Sanmaru Overseas Marketing Sdn Bhd).

[151] The fifth reason as advanced by the defendants was that the payments were consistent with the other "confidential C payments" that were remitted. But the payments that were relied upon by the defendants as seen at pp. 1473 to 1495 of "ARJ V" and at p. 1497 to 1502 of "ARJ V" were not in relation to any alleged "confidential payments" at all. The plaintiffs have explained in para 10 of the affidavit in reply of Hendy Rusli that was D affirmed on 9 November 1993 that the second plaintiff (P.T. Sanmaru Food Manufacturing Co Ltd) had remitted those monies to the first defendant (Far East Food Industries Sdn Bhd (dalam likuidasi)) as advertising and promotional expenses and operating expenses and that the first defendant (Far East Food Industries E Sdn Bhd (dalam likuidasi)) had also remitted monies into an authorised account at Citibank in Singapore as repayment of shareholder loans. The averments by Hendy Rusli in his affidavit in reply at para 10 thereof must be reproduced to counter the defendants' argument that the remittances were consistent with F the other "confidential payments" (see pp. 818 to 819 of "ARJ III"):

> 10. Para (34) to (47)
>
> (a) I am advised and verily believe that the remaining G paragraphs of the deponent's affidavit is misconceived in law. I crave leave to refer to Tan Kong King's affidavit filed on the 26th October 1993. The facts contained therein speak for itself, and needs no further elaboration. The deponent has acted irresponsibly and to the detriment of the 1st Defendant company and Tan Kong King as our representative has every H right to protect the company's interest.
>
> (b) With regard to the account in Singapore, Angel Umali and myself are the authorised account holders and have the full authority to operate the said account. It is none of the I deponent's business as to the reason why the account is operated in the name of Angel Umali and myself so long as the company authorises the same. I annexed herewith the

relevant documents in support of our authority to operate the said account in Singapore and marked as exhibit HR-E. I confirmed that (the) 2nd Plaintiff did remit money to the 1st Defendant not as reimbursement as alleged by (the) deponent but rather (as) advertising and promotional expenses, which at that material time the 1st Defendant did not have funds to finance the same. The 2nd Plaintiff in 1989 in fact remitted a sum of US$440,000, and in 1990 remitted another sum of US$500,000. The deponent in his affidavit has expressly admitted that part of this sum was used to finance the advertising and promotional expenses for which he states that the sum of RM1,310,450, was so incurred. The balance of remittance was used by the 1st Defendant for other operating expenses of the 1st Defendant.

(c) The remittance to the Singapore account referred to in para 46 of the deponent's affidavit has nothing to do with the advances made to the1st Defendant for the aforesaid advertising and promotional expenses. The said remittance to the Singapore account was in fact repayment of shareholders' loan which was remitted to the 1st Defendant in the early years of the operation of the 1st Defendant.

(d) The deponent, Yeoh Jin Beng has failed in his affidavit to condescend to the various particulars marked as exhibits HR-12 and HR-13 attached to my earlier affidavit. The said exhibits show clearly the extent of financial assistance rendered to the 1st and 2nd Defendants as companies of the Indofood Group.

(e) If the deponent, Yeoh Jin Beng is the beneficial owner of 20% equity of the 1st Defendant company as alleged, he has yet to explain how as employee of the 1st Plaintiff, he had the financial means to acquire the said equity and from whom. He has failed to disclose from whom he had acquired the said equity. In every such transaction, there has to be a transferor and (a) transferee.

[152] The sixth reason concerned the argument by the defendants that it was a common practice to merely state a nominal consideration and not the sum of US$680,000. But, sad to say, the defendants have failed to adduce any evidence of the alleged common practice. An analysis of the evidence would show that, in reality, the agreed consideration for the assignment of the "Indomie"trade mark registration was RM10 and not US$680,000. It was not a question of common practice but rather it was an agreed consideration borne out by the evidence.

[153] Yeoh Jin Beng's version that an oral agreement was reached between himself and Hendy Rusli at an unknown date in circumstances where according to Yeoh Jin Beng's own admission Hendy Rusli was representing the Indofood group and was going to use monies belonging to the Indofood group (as opposed to Hendy Rusli's own monies) to pay for the US$680,000, did not represent the truth and it was neither credible nor believable, having regard to the following salient facts:

(a) the Indomie trade mark in Indonesia, and in all countries where registration had taken place, belonged to the joint venture entity of the Salim and Jangkar Jati groups;

(b) Yeoh Jin Beng was merely reporting to the Indofood group and had to seek the group's permission and/or instruction on various management matters;

(c) in such circumstances, the commercial reality would have been that the Indofood group would have instructed Yeoh Jin Beng to effect the transfer for a nominal consideration – consistent with their merger agreement in Jakarta;

(d) Yeoh Jin Beng acted pursuant to such instructions when he executed the deed of assignment on behalf of the second defendant (Sanmaru Overseas Marketing Sdn Bhd) and signed the covering letter dated 25 July 1990 and submitted the executed deed of assignment to Messrs Shearn Delamore for their further action;

(e) in at least nine contemporaneous documents as alluded to somewhere in this judgment and exchanged between Yeoh Jin Beng, the plaintiffs and Messrs Shearn Delamore from 1990 to 1993, those documents did not make any reference to the sum of US$680,000;

(f) of critical importance would be the averment in the deed of assignment which states that the consideration was for a mere RM10;

(g) the excuse given by Yeoh Jin Beng in September 1992 that the trade mark was not transferred because of the alleged Boustead injunction, which even if true, could only have been a fetter for a short period of time;

(h) Yeoh Jin Beng produced the side letter which made reference, for the very first time, in regard to the sum of US$680,000 in his affidavit affirmed on 26 October 1993 and the delay was for three years three months one day – a most convenient afterthought;

(i) Hendy Rusli categorically denied receiving the side letter; and

(j) PWI (Cesar M. de la Cruz) testified that Yeoh Jin Beng's alleged side letter was never brought up for discussion at management meetings of the Indofood group during the early 1990's when both Hendy Rusli and Cesar M. de la Cruz were members of the management committee.

[154] It was hardly surprising that based on the totality of the evidence, the High Court found as a fact that the consideration for the transfer was RM10. If Yeoh Jin Beng's version had been believed by the High Court it would mean that any finding of fact that the true consideration was US$680,000 would result in the High Court determining that the deed of assignment contained a false statement on a very material fact, namely, the consideration bearing in mind that Yeoh Jin Beng had admitted to conceal the consideration of US$680,000 for the purpose of defrauding the revenue.

Constructive Trust

[155] As I said earlier that the deed of assignment for Malaya, Sabah and Sarawak in "ARJ III" at pp. 797 to 798 was executed by both parties on 26 September 1990. The deed of assignment expressly states the consideration of RM10 was "paid by the Assignees (referring to the first plaintiff (P.T. Indofood Interna Corp.)) to the Assignors (referring to the second defendant (Sanmaru Overseas Marketing Sdn Bhd)), the receipt whereof the Assignors hereby acknowledge". That being the case, the second defendant (Sanmaru Overseas Marketing Sdn Bhd) must be estopped from denying that the first plaintiff (P.T. Indofood Interna Corp.) had paid to it the declared consideration of RM10. In such a situation and pending the registration of the assignment of the trade mark, the position in equity may be described in the same way in which Jessel M.R. described the contract in *Lysaght v. Edwards* [1876] 2 Ch D 499, 506:

A It appears to me that the effect of a contract for sale has been settled for more than two centuries; certainly it was completely settled before the time of Lord Hardwicke, who speaks of the settled doctrine of the Court as to it. What is that doctrine? It is that the moment you have a valid contract for sale the vendor B becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering C possession.

Continuing at p. 510 of the report, Jessel M.R. had this to say:

It must, therefore, be considered to be established that the vendor is a constructive trustee for the purchaser of the estate from the D moment the contract is entered into.

[156] The Federal Court in *Temenggong Securities Ltd. & Anor. v. Registrar Of Titles, Johore & Ors.* [1974] 2 MLJ 45 accepted the equitable principle propounded by Jessel M.R. in *Lysaght v. Edwards (supra)* and said through Ong Hock Sim FJ at p. 47 of E the report that:

The law is clear that the vendors, after receipt of the full purchase price and surrender of possession of the lands to the appellants are bare trustees for the appellants of the said land and it must F consequently follow, as night must day, that the vendors have no interests in the lands which can be the subject matter of a caveat.

[157] The Privy Council affirmed the decision of the Federal Court *vide Registrar Of Titles, Johore v. Temenggong Securities Ltd.* [1976] 2 MLJ 44. G

[158] It must be emphasised that although *Lysaght v. Edwards* and *Temenggong Securities* were cases involving the sale of immoveable properties and the filing of a registrar's caveat respectively, the courts there were merely recognising the general principles of H equity which would apply to all kinds of transfers and dealings of all types of property. These equitable principles are also applicable to an assignment of a trade mark like the present case at hand.

[159] The law is quite settled. It is this. That a person who holds I property on a constructive trust is a constructive trustee in respect of that property (*Soar v. Ashwell* [1893] 2 QB 390 at 393). And the person in question cannot claim for himself any increase in

value of the property or any profits earned from that property. And if the person becomes a bankrupt, the property is not available for that person's general creditors but rather it is for the benefit of the beneficiaries in whose favour the constructive trust was held.

[160] Hashim Yeop A. Sani J (as he then was) in *Yong Nyee Fan & Sons Sdn. Bhd. v. Kim Guan & Co. Sdn. Bhd.* [1978] 1 LNS 244 makes a valiant attempt at defining the word "trust". This was what his Lordship said:

> It has been found difficult to give a satisfactory definition of a trust but it has been accepted that the most satisfactory definition is by Professor Keeton which definition is that a trust is the relationship which arises wherever a person called the trustee is compelled in Equity to hold property, real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one) or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustee, but to the beneficiaries or other objects of the trust.

[161] And "trusts" which arise by operation of law are generally referred to as constructive trust. A constructive trust is imposed by equity in order to satisfy the needs of justice and good conscience. Lord Denning developed what he called as "a constructive trust of a new model" (*Eves v. Eves* [1975] 3 All ER 768 at 771) by imposing a constructive trust "whenever justice and good conscience required it" (*Hussey v. Palmer* [1972] 3 All ER 744 at p. 747, CA). In *Gissing v. Gissing* [1971] AC 886 at 906, [1970] 2 All ER 780 at 790, HL, Lord Diplock aptly said of resulting or implied trust in these sage words:

> … the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party's words or conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party. On the other hand, he is not bound by any inference which the other party draws as to his intention unless that inference is one which can reasonably be drawn from his words or conduct.

[162] In sharp contrast, no formalities are needed to create a constructive trust. The concept of constructive trust is tied up with the principles of fairness and good conscience. Usually a constructive trust is imposed over the disputed property and constructive trusteeship is placed on the person who is responsible

for that disputed property. The characteristics of a constructive trust may be listed as follows, and they are by no means exhaustive:

(a) a constructive trust arises by operation of law;

(b) it certainly does not depend on the express intention of the settlor like the case of a private trust;

(c) it is also not dependent on the presumed intention of the settlor like the case of an implied trust as well as the resulting trust; and

(d) it depends on the conduct of the parties (*Khor Kuek Jin v. Haji Yasin & Ors.* [1976] 1 LNS 51).

[163] The Americans have their own view. It is this. That a constructive trust is to be imposed so as to prevent an unjust enrichment.

[164] Authorities have shown that constructive trusts will be imposed in the following situations:

(a) on a trustee as a result of the breach of a fiduciary duty (*George Bray v. John Rawlinson Ford* [1896] AC 44 at 51; *Allcard v. Skinner* 57 The Law Times Vol. LVII, NS 61; *M.P.M. Murugappa Chetti & Anor. v. The Official Assignee of Madras* [1937] 1 LNS 38 PC; *Barclays Bank Ltd. v Quistclose Investments Ltd.* [1970] AC 567; *Carreras Rothmans Ltd v. Freeman Mathews Treasure Ltd (in liq) and another* [1985] 1 All ER 155; *Toovey v. Milne* [1819] 2 B. & ALD 682; *Edwards and Other v. Glyn and Others* [1859] 2 EL & EL 29; *In Re Rogers, Ex Parte Holland & Hannen* [1891] 8 Morr 243; *Holder v. Holder and Others* [1968] 1 Ch 353; and *Lee Hiok Woon & Ors v. Lee Hiok Ping & Ors* [1993] 2 SCR 304);

(b) on a stranger who has received the property as a result of the breach of a fiduciary duty (*In re Barney. Barney v. Barney* [1892] 2 Ch 265; and *Mara v. Browne* [1896] 1 Ch 199);

(c) on a trustee as a result of fraudulent or inequitable conduct (*Ng Tien & Anor v. Chow Nim Yan* [1990] 2 CLJ 937; [1990] 1 CLJ (Rep) 209 SC; *English v Dedham Vale Properties Ltd* [1978] 1 All ER 382; *Wan Naimah v. Wan Mohamad Nawawai* [1974] 1 MLJ 41; *Rochefoucauld v. Boustead* [1897] 1 Ch 196; and *Othman & Anor. v. Mek* [1972] 1 LNS 103);

(d) on a vendor as a constructive trustee;

(e) on either party to a mutual will in the context of mutual wills (*J.T. Smith and The Barrow Hematite Steel Company, Limited v. Henry Cooke, Rachel Swinnerton and Others* [1891] AC 297 at 299); and

(f) on married partners and co-habitees (*Binions and Another v. Evans* [1972] 1 Ch 359; and *Lyus and Another v. Prowsa Developments Ltd & Others* [1982] 1 WLR 1044).

[165] Reverting back to the appeal at hand, it must be stated categorically that from 26 September 1990, the second defendant (Sanmaru Overseas Marketing Sdn Bhd) and the third defendant (Yeoh Jin Beng) were holding the Indomie trade mark in Malaysia as constructive trustees for the benefit of the first plaintiff. At this juncture, the germane observations of Millett LJ in the case of *Paragon Finance plc v. D B Thakerar & Co (a firm), Paragon Finance plc and another v. Thimbleby & Co (a firm)* [1999] 1 All ER 400, 409, CA should be referred to. There his Lordship Millett LJ had this to say:

> A constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of property (usually but not necessarily the legal estate) to assert his own beneficial interest in the property and deny the beneficial interest of another.

[166] For all these reasons, I would hold that the second defendant (Sanmaru Overseas Marketing Sdn Bhd) and the third defendant (Yeoh Jin Beng) were, since 26 September 1990, the constructive trustees of the Indomie trade mark in Malaysia for the benefit of the first plaintiff (P.T. Indofood Interna Corp.) This was also the finding of the High Court judge.

Delay And Laches

[167] Two issues surfaced under this category. The first would be the question of whether the second defendant (Sanmaru Overseas Marketing Sdn Bhd) and the third defendant (Yeoh Jin Beng) have been prejudiced by the inordinate and inexcusable delay in prosecuting this action? The second would be the crucial question of whether the plaintiffs are disentitled to the reliefs claimed by reason of the delay and laches?

[168] Both these two issues should be considered together. I have to ask this nagging question. Are the defendants precluded by the doctrine of issue estoppel in claiming that they suffered prejudice by an alleged delay on the part of the plaintiffs in prosecuting this action bearing in mind that they (the defendants) had made a specific application to have this suit struck out for want of prosecution? It must be recalled that the High Court and the Court of Appeal had ruled against the defendants in that application. And that leave to appeal to the Federal Court is still pending.

[169] The defendants were themselves responsible for filing numerous procedural applications of dubious merit. It does not lie in the mouth of the defendants to contend that the plaintiffs were guilty of inordinate delay in setting this suit for trial before the High Court. On the contrary, it was the defendants who were determined to prevent the commencement of the trial including unsuccessfully advancing the stay applications.

[170] It is the judgment of this court that the plaintiffs are not guilty of any conduct that would disentitle them to the reliefs sought by them notwithstanding that there was delay and laches. While the delay was prolonged, it is in all the circumstances, not inordinate or inexcusable and the plaintiffs are not entirely to blame. In this context, two authorities must be put to the forefront. The first would be the case of *Du Sautoy v. Symes And Others*. [1967] 1 All ER 25, a decision of Cross J. There, his Lordship had this to say at pp. 37 to 38 of the report which would surely put the issue of delay in its correct perspective:

> In this case the writ was issued promptly, and I do not think that the fact that the plaintiff was making alternative claims under both branches of cl. 14, one of which he has subsequently abandoned, can affect the right to specific performance, though it may have some bearing on the question of costs. It is said, however, that there was great delay in bringing the action to trial. I have not been taken through the correspondence in detail, but what I gather is alleged by the first defendant is that, though there was some negotiation in the early stages, from about October, 1964, the delay in bringing the action to trial was the fault of the plaintiff. Assuming that to be so, however, I do not think that it is sufficient to justify me in refusing to grant him specific performance and instead to grant damages under Lord Cairns' Act (the Chancery Amendment Act, 1858). I can conceive of a case where, though an action is started promptly, nevertheless, by his

conduct the plaintiff has lulled the defendant into a belief that he is going to ask for damages only and not specific performance; but it would need a clear case to make that out, and no such case has been made out here. Therefore, I make the order for specific performance.

[171] Secondly, it would be the case of *Eagleview Limited v. Worthgate Limited and Another*, decided on 14 July 1998, unreported at the Chancery Division (see Lexis Nexis). There Park J, made the following germane observations:

I can now state my own view on the delay arguments. I entirely accept that there was long delay by Eagleview; that the delay was seriously unsatisfactory; and that no sufficient excuse or explanation for it has been given. I disapprove of the way that Eagleview let its action go to sleep, but if I refuse the remedy of specific performance I thereby effectively destroy the legal rights which in my judgment Eagleview has under its contract. Because Worthgate is in liquidation, damages are likely to be a worthless alternative remedy. I do not believe that I should do that simply because of my disapproval of Eagleview's inaction. I need to think about it more deeply than just to say: 'I will not give you specific performance because you did nothing for four years and it serves you right.' As Cross J said, it needs a clear case to justify the refusal of specific performance. The situation which he visualised was where the plaintiff has lulled the defendant into a sense of false security that he was going to ask for damages only, not specific performance. Eagleview never lulled Worthgate (or Capital Prime either, if it is relevant) into thinking that, because Eagleview was delaying over prosecuting its action, it was only going to seek damages.

In common with most of the Australian judges I think that it is relevant to ask three questions about a plaintiff's delay (here Eagleview's delay):

(1) Did Eagleview's delay indicate that it had abandoned its contract to purchase the property?

The answer is: certainly not. It maintained its caution in force. At one stage the Land Registry wrote and asked whether it still objected to cancellation of the caution. Eagleview's solicitors replied that it did. The Land Registry sent a copy of the letter to Capital Prime.

(2) Did Eagleview's delay cause any prejudice to the vendor (Worthgate)?

A It seems to me that it did not. The prejudice to a vendor which the majority of the High Court of Australia identified in Lamshed was being left for a protracted period, not knowing whether he had sold the property or not and not being able to deal with it. There was nothing like that in this case. Worthgate resold the property to Capital Prime on the very day on which it purported to rescind its contract with Eagleview. Worthgate clearly wanted to see the back of Eagleview, probably because Mr Cooper believed that Mr Yeganeh Junior (who ran Eagleview) was playing a devious game and had planted the squatters in the property. Whatever the reason, the correspondence and other contemporary documents show that Worthgate was falling over itself to rescind its contract with Eagleview as soon as it could, and to re-sell the property to Capital Prime pursuant to negotiations with Capital Prime which it had conducted without Eagleview knowing about them. It did both of those things long before any delay by Eagleview began, and Eagleview's delay did not restrict Worthgate's dealing with the properties in any way at all.

(3) Did Eagleview's delay prejudice any third parties?

Again, it seems to me that it did not. The only relevant third party is Capital Prime. Capital Prime may be in an awkward situation now, but that is not the result of Eagleview's delay. It is primarily the result of Capital Prime having chanced its arm in 1993. It knew all about Worthgate's contract to sell to Eagleview, but it decided to go ahead with its purchase anyway. Capital Prime's solicitors warned it about Eagleview's caution, but Capital Prime decided to take the risk. Further, after the failure of Eagleview's Order 86 application, Eagleview's solicitors wrote to Johnson Fry, Capital Prime's sponsoring organisation, stating:

> We give you notice that any works or expenses incurred by yourself will be regarded by us as entirely at your company's own risk and is (sic) clearly not a bar to specific performance being granted to our clients.

Capital Prime went ahead nevertheless, and spent substantial sums on renovating the property and converting it into flats. This was Capital Prime's own decision, and Eagleview's delay had nothing to do with it. At that time, Eagleview's period of delay had not even started.

It is true that a long period of delay by Eagleview followed, but Capital Prime was just as responsible for the delay as was Eagleview. Capital Prime had put provisions into its contract with Worthgate, designed to get the situation about Eagleview's caution sorted out. Capital Prime sat back and allowed Worthgate to ignore them. It seems to me quite likely that, if Capital Prime

thought about the matter at all, it took the view that if it kept its head down and did nothing to stir Worthgate or Eagleview into action, Eagleview would in practice go away and forget about its contract.

For the foregoing reasons, while Eagleview's delay in pursuing its actions is to be deplored, I do not think that it has been the cause of any prejudice to Worthgate or Capital Prime, and I do not consider that it is a sufficient reason for me to refuse to grant to Eagleview an order for specific performance.

[172] On the totality of the evidence presented during the trial before the High Court, we have come to the following conclusions:

(a) that the contemporaneous documents all point in one direction and that would be that the agreed consideration for the transfer of the registered trade mark "Indomie" by the second defendant (Sanmaru Overseas Marketing Sdn Bhd) to the first plaintiff (P.T. Indofood Interna Corp.) was RM10;

(b) even though PWI (Cesar M. de la Cruz) was extensively cross-examined, his testimony stood firm and was not shaken;

(c) that the plaintiffs' second witness – PW2 (Pandi Kusuma) was hardly tested in cross-examination;

(d) that the third defendant (Yeoh Jin Beng) who testified as DWI was not a credible witness because he shifted his stand on numerous occassions;

(e) that all the parties were part and parcel of the Indofood group at all material times;

(f) that the second defendant (Sanmaru Overseas Marketing Sdn Bhd) was holding the Indomie trade mark in Malaysia as a constructive trustee for the benefit of the first plaintiff (P.T. Indofood Interna Corp.); and

(g) that having regard to the manner in which numerous interlocutory applications in the High Court and appeals to the Court of Appeal were filed on behalf of all parties in this suit, the details of which are summarised in the amended reply filed on behalf of the plaintiffs on 11 November 2005 (see the particulars in para 7 at pp. 92 to 95 of ("ARJ I")), the

plaintiffs cannot be accused of undue delay. At any rate, since the trial in the High Court has concluded, there is no evidence of any prejudice suffered by the defendants in the conduct of the trial.

Conclusion

[173] The High Court judge was justified in giving judgment in favour of the plaintiffs after a long drawn trial. There was ample documentary evidence to entitle the High Court judge to reach the conclusions which he did. There was no error of law on his part. Neither did he misappreciate the available evidence. On the contrary, the assessment of the available evidence was correctly and judiciously done and it was done in an admirable way. The defendants have failed to demonstrate to this court that the High Court judge was "plainly wrong" in arriving at his decision. There is no reason to disturb the decision of the High Court judge.

[174] This is a unanimous decision of this court. The appeal is dismissed with costs here and below. Deposit to the plaintiffs to account of taxed costs. All the orders of the High Court judge are hereby affirmed. An oral application for a stay was refused. The defendants were advised to file a formal application.

[175] My learned brother Abu Samah bin Nordin, JCA has seen this judgment in draft and has kindly expressed his agreement with it.